REPORT
OF THE
INTERNATIONAL LAW
COMMISSION
on the work of its forty-second session

1 May – 20 July 1990

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTY-FIFTH SESSION

SUPPLEMENT No. 10 (A/45/10)

UNITED NATIONS

REPORT
OF THE
INTERNATIONAL LAW
COMMISSION
on the work of its forty-second session

1 May – 20 July 1990

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTY-FIFTH SESSION

SUPPLEMENT No. 10 (A/45/10)

UNITED NATIONS

New York, 1990

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook . . . 1971*) indicates a reference to the *Yearbook of the International Law Commission.*

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 1990.*

ISSN 0082 — 822X

[Original: Arabic/Chinese/
English/French/
Russian/Spanish]

[29 August 1990]

CONTENTS

Chapter	Paragraphs	Page
I. INTRODUCTION	1 - 19	1
A. Membership	2 - 3	1
B. Officers	4 - 5	2
C. Drafting Committee	6	3
D. Working Group established pursuant to the request contained in General Assembly resolution 44/39	7	3
E. Secretariat	8	4
F. Agenda	9 - 10	4
G. General description of the work of the Commission at its forty-second session	11 - 19	5
II. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND	20 - 158	10
A. Introduction	20 - 26	10
B. Consideration of the topic at the present session	27 - 92	12
1. Complicity, conspiracy and attempt	33 - 76	15
(a) Questions of methodology	33 - 39	15
(b) Complicity	40 - 56	17
(c) Conspiracy	57 - 67	23
(d) Attempt	68 - 76	28
2. International illicit traffic in narcotic drugs	77 - 88	31

READEX FICHE

CONTENTS (continued)

Chapter		Paragraphs	Page
	3. Breach of a treaty designed to ensure international peace and security	89 - 92	35
	C. Question concerning the establishment of an international criminal jurisdiction	93 - 157	36
	1. Terms of reference	94 - 102	36
	2. Previous United Nations efforts in the field of an international criminal jurisdiction	103 - 115	40
	3. Discussion of the question by the Commission at the present session	116	45
	(a) General considerations	117 - 122	45
	(b) Jurisdiction and competence	123 - 137	46
	(i) Subject-matter	123 - 127	46
	(ii) Competence and jurisdiction over persons	128 - 129	47
	(iii) Nature of jurisdiction	130 - 134	48
	(iv) Submission of cases	135 - 137	49
	(c) Structure of the court	138 - 144	49
	(i) Institutional structure	138 - 140	49
	(ii) Composition of court	141	50
	(iii) Election of judges	142	50
	(iv) Organs charged with criminal prosecution	143	50
	(v) Pre-trial examination	144	50
	(d) Legal force of judgements	145 - 147	51
	(e) Other questions	148 - 151	51
	(i) Penalties	148 - 149	51

CONTENTS (continued)

Chapter		Paragraphs	Page
	(ii) Implementation of judgements	150	51
	(iii) Financing of the court	151	51
	(f) Other possible international trial mechanisms	152 - 154	52
	(g) Conclusions	155 - 157	52
	(i) International criminal court with exclusive jurisdiction		52
	(ii) Concurrent jurisdiction between an international criminal court and national courts		53
	(iii) An international criminal court having only a review competence		54
	D. Draft articles of the draft Code of crimes against the peace and security of mankind	158	54
	1. Text of draft articles provisionally adopted so far by the Commission	158	54
	2. Text of draft articles 16, 18 and X with commentaries thereto, as provisionally adopted by the Commission at its forty-second session	158	62
III.	JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY	159 - 243	71
	A. Introduction	159 - 164	71
	B. Consideration of the topic at the present session	165 - 243	72
	1. Part III. [Limitations on] [exceptions to] State immunity	172 - 215	76
	Article 12. *Contracts of employment*	175 - 184	77
	Article 13. *Personal injuries and damage to property*	185 - 191	82

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

Article 14. *Ownership, possession and use of property* .... 192 - 196 85

Article 15. *Patents, trade marks and intellectual or industrial property* .... 197 - 198 87

Article 16. *Fiscal matters* .... 199 - 201 88

Article 17. *Participation in companies or other collective bodies* ...... 202 - 203 89

Article 18. *State-owned or State-operated ships engaged in commercial service* .... 204 - 207 90

Article 19. *Effects of an arbitration agreement* .... 208 - 213 93

Article 20. *Cases of nationalization* ..... 214 - 215 96

2. Part IV. State immunities in respect of property from measures of constraint .... 216 - 228 96

(*Article 21*. *State immunity from measures of constraint*,
(*Article 22*. *Consent to measures of constraint* and
(*Article 23*. *Specific categories of property* .... 217 - 228 97

3. Part V. Miscellaneous provisions .... 229 - 241 105

Article 24. *Service of process* .... 229 - 231 105

Article 25. *Default judgement* .... 232 - 234 108

Article 26. *Immunity from measures of coercion* .... 235 - 236 109

Article 27. *Procedural immunities* .... 237 - 238 110

Article 28. *Non-discrimination* .... 239 - 241 111

4. Settlement of disputes .... 242 - 243 112

CONTENTS (continued)

Chapter	Paragraphs	Page
IV. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES	244 - 313	113
A. Introduction	244 - 250	113
B. Consideration of the topic at the present session	251 - 311	115
1. General comments	255 - 258	116
2. Comments on specific draft articles	259 - 303	117
Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses	259 - 266	117
Article 25. Regulation of international watercourses	267 - 274	119
Article [26]. Joint institutional management	275 - 290	121
(Article [27]. Protection of water resources and installations and (Article [28]. Status of international watercourses and water installations in time of armed conflict	291 - 303	126
3. Annex I. Implementation of the draft articles	304 - 311	131
C. Draft articles on the law of the non-navigational uses of international watercourses	312	137
1. Texts of the draft articles provisionally adopted so far by the Commission	312	137

CONTENTS (continued)

Chapter		Paragraphs	Page
	2. Texts of draft articles 22 to 27 with commentaries thereto provisionally adopted by the Commission at its forty-second session	312	147
	D. Points on which comments are invited	313	178
V.	STATE RESPONSIBILITY	314 - 413	179
	A. Introduction	314 - 319	179
	B. Consideration of the topic at the present session	320 - 412	181
	1. General approach	322 - 343	181
	2. Specific articles	344 - 407	189
	Article 8. Reparation by equivalent	344 - 377	189
	Article 9. Interest	378 - 387	207
	Article 10. Satisfaction and guarantees of non-repetition	388 - 407	210
	3. The impact of fault on the forms and degrees of reparation	408 - 412	218
	C. Text of the draft articles of Part Two provisionally adopted so far by the Commission	413	221
VI.	RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)	414 - 464	225
	A. Introduction	414 - 421	225
	B. Consideration of the topic at the present session	422 - 464	227
VII.	INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW	465 - 531	242
	A. Introduction	465 - 468	242

CONTENTS (continued)

Chapter Paragraphs Page

B. Consideration of the topic at the present session .... 469 - 530 243

1. General approach and scope .... 473 - 483 246

(a) Activities involving risk and activities with harmful effects ...... 473 - 477 246

(b) Further clarification of scope .... 478 - 483 248

2. Chapters and articles included in the outline proposed by the Special Rapporteur .... 484 - 525 251

(a) Chapter I. General provisions ...... 484 - 488 251

(Article 1. Scope of the present
(articles and
(Article 2. Use of terms .... 484 - 487 251

(Article 3. Assignment of
(obligation,
(Article 4. Relationship between
(the present articles and
(other international
(agreements and
(Article 5. Absence of effect upon
(other rules of
(international law 488 256

(b) Chapter II. Principles .... 489 - 493 257

Article 10. Non-discrimination ...... 492 - 493 258

(c) Chapter III. Prevention .... 494 - 507 259

(Article 11. Assessment,
(notification and
(information and
(Article 12. Participation by
(the international
(organization .... 495 - 496 260

CONTENTS (*continued*)

Chapter	Paragraphs	Page
(*Article 13*. *Initiative by the presumed affected State*, (*Article 14*. *Consultations*, (*Article 15*. *Protection of national security or industrial secrets* and (*Article 16*. *Unilateral preventive measures*	497 - 499	262
Article 17. *Balance of interests* ...	500 - 501	264
(*Article 18*. *Failure to comply with the foregoing obligations*, (*Article 19*. *Absence of reply to the notification* and (*Article 20*. *Prohibition of the activity*	502 - 507	266
(d) Chapter IV. Liability	508 - 519	270
(*Article 21*. *Obligation to negotiate*, (*Article 22*. *Plurality of affected States* and (*Article 23*. *Reduction of compensation payable by the State of origin*	511 - 514	272
(*Article 24*. *Harm to the environment and resulting harm to persons or property*, (*Article 25*. *Plurality of States of origin*, (*Article 26*. *Exceptions* and (*Article 27*. *Limitation*	515 - 519	274
(e) Chapter V. Civil liability	520 - 525	279
3. Liability for harm to the environment in areas beyond national jurisdiction (global commons)	526 - 530	282
C. Points on which comments are invited	531	285

CONTENTS (*continued*)

Chapter	*Paragraphs*	*Page*
VIII. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION	532 - 567	286
A. Programme, procedures and working methods of the Commission and its documentation	532 - 552	286
B. Co-operation with other bodies	553 - 555	293
C. Date and place of the forty-third session	556	294
D. Representation at the forty-fifth session of the General Assembly	557	294
E. International Law Seminar	558 - 567	294

CHAPTER I

INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-second session at its permanent seat at the United Nations Office at Geneva, from 1 May to 20 July 1990. The session was opened by the Chairman of the forty-first session, Mr. Bernhard Graefrath.

A. Membership

2. The Commission consists of the following members:

Prince Bola Adesumbo AJIBOLA (Nigeria)
Mr. Husain AL-BAHARNA (Bahrain)
Mr. Awn AL-KHASAWNEH (Jordan)
Mr. Riyadh AL-QAYSI (Iraq)
Mr. Gaetano ARANGIO-RUIZ (Italy)
Mr. Julio BARBOZA (Argentina)
Mr. Juri G. BARSEGOV (Union of Soviet Socialist Republics)
Mr. John Alan BEESLEY (Canada)
Mr. Mohamed BENNOUNA (Morocco)
Mr. Boutros BOUTROS-GHALI (Egypt)
Mr. Carlos CALERO-RODRIGUES (Brazil)
Mr. Leonardo DIAZ-GONZALEZ (Venezuela)
Mr. Gudmundur EIRIKSSON (Iceland)
Mr. Laurel B. FRANCIS (Jamaica)
Mr. Bernhard GRAEFRATH (German Democratic Republic)
Mr. Francis Mahon HAYES (Ireland)
Mr. Jorge E. ILLUECA (Panama)
Mr. Andreas J. JACOVIDES (Cyprus)
Mr. Abdul G. KOROMA (Sierra Leone)
Mr. Ahmed MAHIOU (Algeria)
Mr. Stephen C. McCAFFREY (United States of America)
Mr. Frank X. NJENGA (Kenya)
Mr. Motoo OGISO (Japan)
Mr. Stanislaw PAWLAK (Poland)

Mr. Alain PELLET (France)
Mr. Pemmaraju SREENIVASA RAO (India)
Mr. Edilbert RAZAFINDRALAMBO (Madagascar)
Mr. Emmanuel J. ROUCOUNAS (Greece)
Mr. César SEPULVEDA-GUTIERREZ (Mexico)
Mr. Jiuyong SHI (China)
Mr. Luis SOLARI TUDELA (Peru)
Mr. Doudou THIAM (Senegal)
Mr. Christian TOMUSCHAT (Federal Republic of Germany)
Mr. Alexander YANKOV (Bulgaria)

3. At its 2165th meeting, on 30 May 1990, the Commission elected Mr. Alain Pellet (France) to fill the casual vacancy in the Commission caused by the death of Mr. Paul Reuter.

B. Officers

4. At its 2149th meeting on 1 May 1990, the Commission elected the following officers:

Chairman:	Mr. Jiuyong Shi
First Vice-Chairman:	Mr. Julio Barboza
Second Vice-Chairman:	Mr. Juri G. Barsegov
Chairman of the Drafting Committee:	Mr. Ahmed Mahiou
Rapporteur:	Mr. Gudmundur Eiriksson

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the

---

1/ Namely, Mr. Laurel B. Francis, Mr. Doudou Thiam, Mr. Alexander Yankov, Mr. Stephen C. McCaffrey, Mr. Leonardo Díaz-González and Mr. Bernhard Graefrath.

2/ Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Leonardo Díaz-González, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso and Mr. Doudou Thiam.

recommendation of the Enlarged Bureau, the Commission, at its 2152nd meeting on 4 May 1990, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to the Enlarged Bureau. The Planning Group was composed of the following members:

Mr. Julio Barboza (Chairman), Prince Bola Adesumbo Ajibola, Mr. Husain Al-Baharna, Mr. Riyadh Al-Qaysi, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Carlos Calero-Rodrigues, Mr. Leonardo Díaz-González, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Andreas J. Jacovides, Mr. Frank X. Njenga, Mr. Motoo Ogiso, Mr. Pemmaraju Sreenivasa Rao, Mr. Emmanuel J. Roucounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

C. Drafting Committee

6. At its 2150th meeting, on 2 May 1990, the Commission appointed a Drafting Committee which was composed of the following members:

Mr. Ahmed Mahiou (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Juri G. Barsegov, Mr. Carlos Calero-Rodrigues, Mr. Leonardo Díaz-González, Mr. Francis Mahon Hayes, Mr. Abdul G. Koroma, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso, Mr. Stanislaw Pawlak, Mr. Edilbert Razafindralambo, Mr. César Sepulveda-Gutierrez, Mr. Jiuyong Shi and Mr. Luis Solari-Tudela.

D. Working Group established pursuant to the request contained in General Assembly resolution 44/39 3/

7. At its 2158th meeting, on 16 May 1990, the Commission established a Working Group pursuant to the request contained in General Assembly resolution 44/39 which was composed of the following members:

3/ Entitled "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes".

Mr. Doudou Thiam (Chairman), Mr. Husain Al-Baharna, Mr. John Alan Beesley, Mr. Mohamed Bennouna, Mr. Leonardo Díaz-González, Mr. Bernhard Graefrath, Mr. Jorge E. Illueca, Mr. Abdul G. Koroma, Mr. Stanislaw Pawlak, Mr. Pemmaraju Sreenivasa Rao and Mr. Emmanuel J. Roucounas. Mr. Gudmundur Eiriksson also participated in his capacity as Rapporteur of the Commission.

E. Secretariat

8. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Vladimir S. Kotliar, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and in the absence of the Legal Counsel represented the Secretary-General. Ms. Jacqueline Dauchy, Deputy Director of the Codification Division of the Office of Legal Affairs, acted as Deputy Secretary to the Commission. Ms. Sachiko Kuwabara and Mr. Manuel Rama-Montaldo, Senior Legal Officers, served as Senior Assistant Secretaries to the Commission and Ms. Mahnoush H. Arsanjani and Mr. Andrzej Makarewicz, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

9. At its 2150th meeting, on 2 May 1990, the Commission adopted an agenda for its forty-second session, consisting of the following items:

1. Organization of work of the session.
2. Filling of a casual vacancy in the Commission (art. 11 of the Statute).
3. State responsibility.
4. Jurisdictional immunities of States and their property.
5. Draft Code of Crimes against the Peace and Security of Mankind.
6. The law of the non-navigational uses of international watercourses.
7. International liability for injurious consequences arising out of acts not prohibited by international law.
8. Relations between States and international organizations (second part of the topic).
9. Programme, procedures and working methods of the Commission, and its documentation.

10. Co-operation with other bodies.

11. Date and place of the forty-third session.

12. Other business.

10. The Commission considered all the items on its agenda. The Commission held 55 public meetings (2149th to 2204th) and, in addition, the Drafting Committee of the Commission held 43 meetings, the Enlarged Bureau of the Commission held 4 meetings, the Planning Group of the Enlarged Bureau held 4 meetings and the Working Group established pursuant to the request contained in General Assembly resolution 44/39 held 5 meetings.

G. General description of the work of the Commission at its forty-second session

11. At its forty-second session, the Commission devoted 16 meetings to the topic "Draft Code of Crimes against the Peace and Security of Mankind". [4] The discussions were held on the basis of the eighth report of the Special Rapporteur, Mr. Doudou Thiam (A/CN.4/430 and Add.1) which contained in particular three draft articles dealing respectively with complicity, conspiracy and attempt, an article on illicit traffic in narcotic drugs, as a crime against peace, and an article on illicit traffic in narcotic drugs, as a crime against humanity. The report also contained a Section entitled "Statute of an International Criminal Court". At the conclusion of its discussion, the Commission referred to the Drafting Committee the above-mentioned draft articles, together with revised versions thereof submitted by the Special Rapporteur in the light of the debate. The Commission furthermore provisionally adopted, on the recommendation of the Drafting Committee, three new articles on the topic (with commentaries thereto) for inclusion in Chapter II of the Draft Code, namely article 16 "International Terrorism", article 18 "Recruitment, Use, Financing and Training of Mercenaries", and

---

[4] The topic was examined at the 2150th to 2159th and at the 2192nd, 2193rd, 2194th, 2196th, 2197th and 2198th meetings, held between 2 and 17 May 1990 and between 12 and 17 July 1990.

article X "Illicit drug trafficking". The Commission also discussed the question of an article on breaches of treaties designed to ensure international peace and security (see Chapter II, Section B 3 below).

12. In the context of its consideration of the topic "Draft Code of Crimes against the Peace and Security of Mankind", the Commission established a Working Group (see para. 7 above) to consider the request addressed to it by the General Assembly in resolution 44/39 on the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed certain crimes. The results of the work carried out in this connection by the Commission are reflected in Chapter II, Section D of the present report.

13. The Commission devoted six meetings to the topic "Jurisdictional immunities of States and their property". 5/ The discussions were held on the basis of the third report of the Special Rapporteur, Mr. Motoo Ogiso (A/CN.4/431 and Corr.1) which contained, for a number of the articles adopted on first reading, revised texts proposed by the Special Rapporteur. At the conclusion of its discussions, the Commission referred articles 12 to 28 to the Drafting Committee which had already pending before it articles 1 to 11 bis referred to it at the previous session. The Commission received from the Drafting Committee a report containing 16 articles adopted on second reading by the Commission at the current session. It took note of that report and decided to defer action on it until its next session, at which time it intends to complete the second reading of the draft as a whole.

14. The Commission devoted eight meetings to the topic "The law of the non-navigational uses of international watercourses. 6/ The discussions were held on the basis of the second part of the fifth report of the Special Rapporteur, Mr Stephen McCaffrey (A/CN.4/421/Add.2) - which contained in

---

5/ The topic was examined at the 2158th to 2162nd and 2191st meetings held between 17 and 23 May and on 11 July 1990.

6/ The topic was examined at the 2162nd to 2167th, 2187th and 2188th meetings held between 23 May and 1 June and on 5 and 6 July 1990.

particular two draft articles respectively entitled "Relationship between navigational and non-navigational uses" and "Regulation of international watercourses" - as well as on the basis of the first part of the Special Rapporteur's sixth report (A/CN.4/427 and Corr.1) which contained in particular three draft articles respectively entitled "Joint institutional management", "Protection of water resources and installations" and "Status of international watercourses and water installations in time of armed conflict", as well as an Annex entitled "Implementation of the draft articles" and consisting of six articles. At the conclusion of its discussion, the Commission referred to the Drafting Committee the above-mentioned draft articles as well as article 3, paragraph 1, and article 4 of the Annex. The Commission furthermore provisionally adopted 6 new articles on the topic (with commentaries thereto), namely articles 22 "Protection and preservation of ecosystems", 23 "Prevention, reduction and control of pollution", 24 "Introduction of alien or new species" and 25 "Protection and preservation of the marine environment", comprising Part IV of the draft entitled "Protection and preservation", as well as articles 26 "Prevention and mitigation of harmful conditions" and 27 "Emergency situations", comprising Part V entitled "Harmful conditions and emergency situations". The second part of the sixth report of the Special Rapporteur (A/CN.4/427/Add.1) was not discussed for lack of time.

15. The Commission devoted eight meetings to the topic "State responsibility". [7] The discussions were held on the basis of the second report of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz (A/CN.4/425 and Corr.1 (English only) and A/CN.4/425/Add.1 and Corr.1 (English only)), which contained, *inter alia*, three draft articles respectively entitled "Reparation by equivalent", "Interest", "Satisfaction and guarantees of non-repetition". At the conclusion of its discussion, the Commission referred all three draft articles to the Drafting Committee.

---

[7] The topic was examined at the 2168th to 2175th meetings held between 5 and 15 June 1990.

16. The Commission devoted five meetings to the topic "Relations between States and international organizations (second part of the topic)". 8/ The discussions were held on the basis of the fourth report of the Special Rapporteur, Mr. Leonardo Díaz-González (A/CN.4/424) which contained 11 draft articles, namely articles 1 to 4 comprising Part I (Introduction), articles 5 and 6 comprising Part II (Legal personality) and articles 7 to 11 comprising Part III entitled "Property, Funds and Assets". At the conclusion of its discussion, the Commission referred all 11 draft articles to the Drafting Committee. The fifth report of the Special Rapporteur (A/CN.4/432) was not discussed for lack of time.

17. The Commission devoted eight meetings to the topic "International liability for injurious consequences arising out of acts not prohibited by international law". 9/ The discussions were held on the basis of the sixth report of the Special Rapporteur, Mr. Julio Barboza (A/CN.4/428 and Corr.1, Corr.2 (English only), Corr.3 (Spanish only) and Corr.4), which contained, inter alia, 33 articles, namely articles 1 to 5 comprising Chapter I entitled "Introduction", articles 6 to 10 comprising Chapter II entitled "Principles", articles 11 to 20 comprising Chapter III entitled "Prevention", articles 21 to 27 comprising Chapter IV entitled "Liability" and articles 28 to 33 comprising Chapter V entitled "Civil liability". At the conclusion of its discussion, the Commission decided to revert at its next session to some policy and technical issues raised in the sixth report.

18. With respect to the topics "The law of the non-navigational uses of international watercourses" and "International liability for injurious consequences arising out of acts not prohibited by international law", the

---

8/ The topic was examined at the 2176th to 2180th meetings held between 19 and 26 June 1990.

9/ The topic was examined at the 2179th, 2181st to 2186th and 2190th meetings held between 22 June and 10 July 1990.

Commission indicated issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work. 10/

19. Matters relating to the programme, procedures and working methods of the Commission and its documentation were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant recommendations of the Commission are to be found in the last chapter of the report which also deals with co-operation with other bodies and with certain administrative and other matters.

10/ See paragraphs 313 and 531 below.

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

20. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

21. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 11/

22. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

23. The General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted by consensus the Definition of Aggression.

11/ *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316. *Yearbook ... 1954*, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also *Yearbook ... 1985*, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

24. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 12/

25. The Commission, at its thirty-fourth session in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 13/ The Commission, from its thirty-fifth session, in 1983, to its forty-first session, in 1989, received seven reports from the Special Rapporteur. 14/

26. During these sessions, the Commission took certain preliminary decisions regarding the content *ratione personae* and the content *ratione materiae* of the draft Code. 15/ It also referred to the Drafting Committee articles 1 to 14

12/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the titled of the topic in English. Accordingly, the title of the topic in English reads "Draft Code of Crimes against the Peace and Security of Mankind".

13/ For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (*Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10*, A/38/10), paras. 26 to 41.

14/ *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/274; *Yearbook ... 1984*, vol. II (Part One), p. 89, document A/CN.4/377. *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/387; *Yearbook ... 1986*, vol. II, document A/CN.4/398; *Yearbook ... 1987*, vol. II (Part One), document A/CN.4/404; *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/411 and *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr. 1 and 2 (Spanish only).

15/ *Yearbook ... 1984*, vol. II (Part Two), p.17, document A/39/10, para. 65.

contained in the Special Rapporteur's reports. 16/ At those sessions, the Commission adopted provisionally the following articles: 1. (Definition); 2. (Characterization); 3. (Responsibility and punishment); 4. (Obligation to try or extradite); 5. (Non-applicability of statutory limitations); 6. (Judicial guarantees); 7. (Non bis in idem); 8. (Non-rectroactivity); 10. (Responsibility of the superior); 11. (Official position and criminal responsibility); 12. (Aggression); 13. (Threat of aggression); 14. (Intervention) and 15. (Colonial domination and other forms of alien domination), with the commentaries thereto. 17/

B. Consideration of the topic at the present session

27. At the present session, the Commission had before it the eighth report of the Special Rapporteur on the topic (A/CN.4/430 and Add.1), which consisted of three parts. In Part One, the Special Rapporteur dealt with "Related offences" or "other offences", which he had already examined in his fourth report 18/ namely complicity, conspiracy and attempt. In this part of his eighth report, the Special Rapporteur proposed draft articles on those offences (articles 15, 16 and 17 on complicity, conspiracy and attempt respectively) together with commentaries thereto. 19/ With regard to complicity, the Special Rapporteur examined particularly in his report the question of methodology and its place in the draft Code, the problems arising

---

16/ For a more detailed account of the Commission's work on the topic at these sessions, see the Reports of the International Law Commission on the work of its thirty-seventh session, (Official Records of the General Assembly, Fortieth session, Supplement No. 10 (A/40/10), paras. 34 to 101), thirty-eighth session (Ibid., Forty-first session, Supplement No. 10 (A/41/10), paras. 77 to 185), thirty-ninth session (Ibid., Forty-second session, Supplement No. 10 (A/42/10), paras. 25 to 66), fortieth session (Ibid., Forty-third session, Supplement No. 10 (A/43/10), paras. 211 to 280) and forty-first session (Ibid., Forty-fourth session, Supplement No. 10 (A/44/10), paras. 83 to 217).

17/ For the text of the articles see Section D.1 below.

18/ See Yearbook ... 1986, vol. II (Part One) pp. 63-69, document A/CN.4/398, paras. 89 to 145.

19/ Since the Commission has provisionally adopted 18 articles, the numbering proposed by the Special Rapporteur may later have to be changed.

from physical and intellectual acts of complicity, the question of the characterization of acts of complicity, the distinction between the notions of perpetrator and accomplice and the question whether the act of complicity was committed before or after the principal act. With regard to conspiracy, the Special Rapporteur concentrated more particularly in his commentaries upon the two degrees of conspiracy, namely agreement or concordance of intentions with a view to committing or executing a crime, and physical acts to carry out the crime planned. With regard to the latter aspect of conspiracy, the Special Rapporteur made a special study of the problems raised by the notions of individual responsibility and collective responsibility and, in particular, the problem of the responsibility of organizers. As to attempt, the Special Rapporteur, in his commentaries, examined the question of the possible application of that concept to crimes against the peace and security of mankind.

28. In Part Two of his eighth report, the Special Rapporteur responded to the Commission's request recorded in paragraph 210 of its report on the work of the forty-first session 20/ to prepare for the present session a draft article on international drug trafficking. Bearing in mind the views of several members of the Commission reflected in paragraphs 205 to 209 of that report, the Special Rapporteur thought it necessary to prepare two draft articles, one (article X) making the international traffic in narcotic drugs a crime against peace and the other (article Y) making it a crime against humanity. 21/ The two draft articles were accompanied by commentaries dealing, in particular, with the constituent elements of the crime.

29. In Part Three of his eighth report, dealing with the statute of an international criminal court, the Special Rapporteur followed the approach adopted by the Commission when provisionally adopting article 4 of the

---

20/ Official Records of the General Assembly, Forty-fourth session, Supplement No. 10 (A/44/10).

21/ With regard to the numbering of the two draft articles, the Special Rapporteur pointed out in his report that it would be for the Commission to decide on their final position among the crimes against the peace and the crimes against humanity.

draft Code, on the obligation to try or extradite. 22/ He also responded to paragraph 2 of General Assembly resolutions 43/164 and 44/32 of 9 December 1988 and 4 December 1989 respectively, concerning the draft Code of Crimes against the Peace and Security of Mankind. 23/ Part Three, to which the Special Rapporteur ascribed a preliminary character, was in the nature of a questionnaire-report, the purpose of which was to offer the Commission some choices between different solutions and to elicit responses. The choices related mainly to the following points concerning the possible establishment of an international criminal court: competence of the Court, procedure for appointing judges, submission of cases to the Court, functions of the prosecuting attorney, pre-trial examination, authority of *res judicata* by a court of a State, authority of *res judicata* by the Court, withdrawal of complaints, penalties and financial provisions. For each of the points thus listed, the Special Rapporteur submitted various possible versions of provisions which might form part of the statute of an international criminal court.

30. The Commission considered the Special Rapporteur's eighth report from its 2150th to its 2159th meetings. After hearing the Special Rapporteur's presentation, the Commission considered draft articles 15, 16, 17, X and Y in their new versions. In view of the revised versions of these draft articles

---

22/ Paragraph 3 of draft article 4 states that the provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court. Moreover, paragraph (5) of the commentary points out that paragraph 3 of draft article 4 deals with the possible establishment of an international criminal court and shows that the jurisdictional solution adopted in draft article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court (see Report of the International Law Commission on the work of its fortieth session, (*Official Records of the General Assembly, Forty-third session, Supplement No. 10* (A/43/10), para. 280); see also Section C below.

23/ In paragraph 2 of these resolutions, the General Assembly notes the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft Code and encourages the Commission to explore further all possible alternatives on the question; see also Section C below.

submitted by the Special Rapporteur, the Commission decided, at its 2159th meeting, to refer them to the Drafting Committee. The comments and observations of members of the Commission, including the Special Rapporteur, on these articles are summarized in subsections 1 and 2 below. With regard to Part Three of the report, dealing with the statute of an international criminal court, the Commission decided to set up a working group, the terms of reference and the work of which are examined in detail in Section C below.

31. At its 2196th and 2197th meetings, the Commission, after examining the report of the Drafting Committee, adopted provisionally the following articles: 16 (International terrorism), 18 (Recruitment, use, financing and training of mercenaries) 24/ and X (Illicit drug trafficking). 25/

32. The text of these articles, and the commentaries thereto, appear in section D.2 below.

1. Complicity, conspiracy and attempt

(a) Questions of methodology

33. In introducing Part One of his eighth report, dealing with complicity, conspiracy and attempt, the Special Rapporteur pointed out that its subject-matter had already been discussed in detail during the consideration of his fourth report (A/CN.4/398) at the Commission's thirty-eighth session. Draft articles 15, 16 and 17, dealing respectively with complicity, conspiracy and attempt, were being presented in the light of that discussion.

34. During the Commission's consideration of these three draft articles, some general remarks on methodology were formulated, as well as more specific comments on each draft article which are summarized below.

35. In the opinion of some members, complicity, conspiracy and attempt should not be treated as separate offences in the draft Code, since they only constituted forms of participation in the commission of a certain crime. Complicity, conspiracy and attempt were only punishable in connection with the

---

24/ As regards article 17, see subsection 3 below.

25/ The Commission provisionally decided that this article should be included in the Part of Chapter II devoted to crimes against humanity.

principal crime and were therefore of an accessary character. Consequently, they should be placed in the part of the draft Code dealing with general principles.

36. Moreover, some members took the view that none of those notions - complicity, conspiracy and attempt - could be dealt with in the abstract. Each of them should be examined in relation to each one of the crimes covered by the Code so as to determine, for example, what constituted attempted aggression or attempted genocide. Each crime had to be considered separately and it was necessary to determine to what extent and according to what modalities complicity, conspiracy and attempt were possible for each crime. In their view, instead of including the notions of complicity, conspiracy and attempt among the general principles, the Special Rapporeur should examine them case by case, to determine whether each crime considered could be the subject of complicity, conspiracy or attempt.

37. Lastly, other members supported the Special Rapporteur's approach of treating complicity, conspiracy and attempt as separate offences. One of these members, in particular, while having no objection to those notions appearing in the part of the Code dealing with general principles, as suggested by other members, thought that they should also be retained as separate offences. Mentioning them among the general principles did not preclude their being included in the part dealing with specific offences, where each of those notions could be precisely defined in order to facilitate their application by the courts.

38. With regard to the above-mentioned observations, the Special Rapporteur stressed that the Commission should perhaps not dwell too long on methodological problems, important though they were. In that connection, it had been repeatedly suggested during the debate that the notions of complicity, conspiracy and attempt should have been placed in the part of the draft Code dealing with general principles, rather than in the one dealing with specific offences. He added that some national criminal codes did indeed deal with complicity, conspiracy and attempt in the framework of general provisions. Other Codes, however, adopted a different approach. The French Penal Code, for example, dealt with complicity in its specific provisions and

with attempt in the general part. The Special Rapporteur also pointed out that in the 1954 Draft Code prepared by the Commission, complicity was treated as a crime in paragraph 13 of article 2, not placed in the section dealing with general principles. And in the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal", complicity was unequivocally characterized as an international crime. Since it was a question of methodology, the Special Rapporteur saw no objection to its being settled by the Commission and, in particular, the Drafting Committee, which could select the most appropriate method.

39. As to the suggestion that each crime should be examined separately to determine whether the notions of complicity, conspiracy or attempt were applicable to them, the Special Rapporteur thought that was an impossible task. The Commission should define the three notions and leave it to the competent courts to decide whether they were applicable in specific cases brought before them.

(b) Complicity

40. In his eighth report and in his presentation of draft article 15 on complicity, [26] the Special Rapporteur pointed out that paragraph 2 extended the notion of complicity to acts committed prior to the principal offence and to subsequent accessory acts. He observed that the notion of complicity was

---

[26] The original version of draft article 16 submitted by the Special Rapporteur read as follows:

> "Article 16. Complicity
>
> The following constitute a crime against the peace and security of mankind:
>
> 1. Being an accomplice of any of the crimes defined in this Code.
>
> 2. Within the meaning of this Code, complicity may mean both accessory acts prior to or concomitant to the principal offence and subsequent accessory acts."

highly complex because of the nature of the acts constituting complicity, the plurality of possible accomplices and the problem of the chronological order of the acts committed. Acts of complicity were of two kinds: intellectual acts and physical acts. While it was comparatively easy to identify physical acts, the same was not true of intellectual acts. The Special Rapporteur drew particular attention to the difficulty of distinguishing between the perpetrator of a crime and his accomplice. If a superior officer consented to a criminal act and a subordinate carried it out, it was doubtful who was the intellectual author and who the accomplice.

41. The Special Rapporteur ponted out that the courts had tried to settle that issue in some of their judgements. In the Yamashita case, the United States Supreme Court had held that the order of a commanding officer, or the failure of that officer to give the appropriate instructions to his subordinates, could constitute an act of complicity. But the question had more often been settled by legislation. Thus, under a number of national laws, an order given by a superior, or the failure of that superior to give an order, were treated as an act of complicity.

42. The question also arose, as the Special Rapporteur observed, whether counsel or advice which led a person to commit an offence could be regarded as an act of complicity. In the view of the Special Rapporteur, that would depend largely on the persuasive force of the advice and its effect on the offender's decision. Instigation or encouragement to commit an offence were regarded as acts of complicity by certain legal systems, but not by others.

43. The Special Rapporteur stressed that it was comparatively easy to distinguish between perpetrators and accomplices when dealing with a simple offence such as burglary in which the principal perpetrator was helped by an accomplice to climb over a wall. But where an offence was committed by a group of offenders or was a mass offence, it was difficult to draw the line and there was a school of thought which preferred to abandon the distinction between principal and accomplice and to treat all those involved in the crime as participants on the same footing. Many international military courts had taken that position in their judgements. For instance, the Supreme Court of the British Zone had considered that the act of complicity and the principal

act were both crimes against humanity and that consequently accomplices should be sentenced for having committed a crime against humanity and not for being accomplices in the commission of such a crime.

44. As to the question of the time of commission of the offence, referred to in paragraph 2 of draft article 15, the Special Rapporteur pointed out that in some legal systems, such as the common law systems, far from limiting the definition of complicity to acts of prior to or concomitant with the principal offence, extended it to subsequent acts. The continental systems adopted, for the most part, a more restrictive approach. Some national laws, however, as well as the judgements of the French Cour de Cassation, recognized that giving assistance after the commission of an offence could, in certain circumstances, constitute complicity.

45. Some members maintained that the Commission should not attempt to formulate a definition of complicity, or even of conspiracy, without first defining the criteria which characterized the perpetrator of a crime against the peace and security of mankind, by giving a material definition of the perpetrator, taking into consideration specific elements of particular crimes. Only after that had been done would the Commission be in a position to decide whether it was advisable to define the notion of complicity in great detail.

46. Other members, however, did not think that approach was strictly necessary, since criminal law did not generally define the perpetrator but rather the offence. The law started from the offences and proceeded to the perpetrators, to punish them according to the form of their participation. The Commission should not to be too ambitious in that respect: some notions could not be defined with all the desired precision. Very often, in internal law, it was the judge who determined the role played by each of the accused and there was no reason why the position should be different at the international level. The Commission should provide some guidelines, but it would be for the judge, in each specific case, to determine the responsibility of each of the accused.

47. Some members thought that the traditional categories of criminal law, such as complicity, were easier to apply to war crimes than to crimes against

peace and crimes against humanity. It was pointed out that war crimes were generally committed by individuals or groups on their own initiative, without the knowledge or participation of their superiors. On the other hand, crimes such as aggression, intervention or *apartheid* raised different problems. *Apartheid*, for example, involved a government and a whole people, since anyone living in South Africa knew how *apartheid* operated and anyone voting for a political party advocating *apartheid* supported that system. That was precisely the weak point of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*: by applying automatically the notion of complicity of traditional criminal law, it unduly widened the circle of offenders. What was needed was to strike at the leaders and organizers, since it was impossible to prosecute a whole people.

48. Certain other members, however, did not find such a distinction acceptable and thought it would be possible to devise a single article on complicity applicable to all the crimes covered by the draft Code. While it was true that the existence of conventions on war crimes containing detailed provisions identifying the various possible offences would facilitate characterization of the acts and hence of complicity, there was no denying that the Hague Conventions and the Geneva Conventions, detailed though they were, had sometimes proved to be imprecise.

49. Several members expressed the view that draft article 15 should be more elaborate than the text proposed, so as to identify more clearly the acts of complicity which ought to be covered by the draft Code. In the opinion of one member, the definition given in the draft article should cover both physical acts of complicity, such as aid, assistance, provision of means, etc. and "intellectual" or "moral" acts, which should include instigating or provoking a criminal act or giving the order to commit it. Another member also mentioned instigation, assistance, counsel, order and direction as elements to be covered by the definition of the notion of complicity. Finally, another member proposed the following definition of the notion of complicity: "Any person who aids, abets, counsels or procures the commission of any of the crimes under this Code shall be liable to be tried or is guilty of that crime".

50. With regard more particularly to paragraph 2 of draft article 15 submitted by the Special Rapporteur, several members of the Commission supported his decision to include in the notion of complicity not only accessory acts prior to or concomitant with the principal offence, but also subsequent accessory acts. Other members expressed serious doubts on that point or requested clarification on particular points. Some considered that distinctions should be drawn. When acts subsequent to the crime had been committed on the basis of an agreement or an understanding reached before or during its commission, they undoubtedly constituted acts of complicity. In their view, the position was more complex in the case of an act committed after the crime but without any prior agreement. Such an act could, strictly speaking, constitute a separate criminal offence.

51. Lastly, some members of the Commission, referring to a passage in the report, suggested that in the case of crimes against the peace and security of mankind, it would be preferable to abandon the traditional perpetrator/accomplice dichotomy and adopt the broader notion of "participant", which covered both principal perpetrators and accomplices. In their view, the Commission should give careful attention to that solution and consider formulating a general provision on criminal participation, covering organizers, instigators, perpetrators and accomplices. That provision could appear among the general principles and would apply, in principle, to all the crimes under the Code, it being understood that the judge of the criminal court concerned would have to assess the exact role of the various participants in each case.

52. The Special Rapporteur referred to several of the comments made during the discussion. With regard to the definition of the "perpetrator" of a crime, he said that the absence of any definition of that term in a number of criminal codes, including the French, German and Finnish Codes, had not prevented the competent courts of those countries from functioning properly. In his view, it was for the courts to determine the meaning of that word. The term "perpetrator" was generally understood to mean a person who had committed a crime directly and physically. Although an attempt had been made to extend that notion to indirect perpetrators, for example, such persons were not perpetrators in the strict sense of the term, but accomplices.

53. In the Special Rapporteur's view, the link between the act and the perpetrator, as well as the classification of the perpetrator, should also be determined by the judge in each particular case. The perpetrators were to be sought among those vested with the power of command, who used that power to commit a crime. It could also be said that the person responsible was the individual who used the power vested in him to commit a crime. The Commission's concern, however, was to provide, not for the criminal responsibility of the State, but for that of natural persons acting in the performance of their duties. A war crime could obviously be committed by a soldier on the battlefield who used prohibited means of warfare to commit such a crime, or by an officer who ill-treated prisoners of war. It was accordingly necessary to identify, in each specific case, the persons who, by virtue of their functions or activities, were liable to commit the crime in question, which was essentially a matter for the judge to decide.

54. With regard to the proposals intended to tighten up the notion of complicity, the Special Rapporteur pointed out that the greater the number of participants the more difficult it was to define the notion of an accomplice, which had evolved from the traditional concept of an accomplice present when the crime was committed, to that of an accomplice who took no direct part in its commission. A new category of accomplices had appeared, which was not based on the traditional concept: it comprised those who directed, planned or organized a crime in the perpetration of which they took no direct part. Persons in that category, who had often occupied high-ranking posts in the administrative, political or military hierarchy, and were sometimes judges, had been treated by the Nürnberg Tribunal as accomplices. The Charter of the Nürnberg Tribunal had limited the notion of an accomplice to that category. It had been argued during the debate that it was impossible to prosecute a whole people, but in the case of the Third Reich, the Nürnberg Charter had referred to the leaders, organizers and accomplices.

55. The Special Rapporteur considered that complicity included both physical acts and intellectual or "abstract" acts. Thus, aiding or abetting the principal perpetrator constituted an identifiable physical act whereas counsel, instigation, promises, threats or provocation were abstract acts the existence of which was sometimes difficult to establish.

56. Taking into account some of the observations made during the discussion, the Special Rapporteur submitted to the Commission a new version of draft article 15. 27/

(c) Conspiracy

57. In his eighth report, and in his presentation of draft article 16 on conspiracy, 28/ the Special Rapporteur pointed out that the article comprised

---

27/ The new version of draft article 15 submitted by the Special Rapporteur read as follows:

> "Article 15. Complicity
>
> "Participation in the commission of a crime against the peace and security of mankind constitutes the crime of complicity.
>
> The following are acts of complicity:
>
> (a) Aiding, abetting or provision of means to the direct perpetrator, or making him a promise;
>
> (b) Inspiring the commission of a crime against the peace and security of mankind by, *inter alia*, incitement, urging, instigation, order, threat or abstention, when in a position to prevent it;
>
> [(c) Aiding the direct perpetrator, after the commission of a crime, to evade criminal prosecution, either by giving him refuge or by helping him to eliminate the evidence of the criminal act.]"

28/ The original version of draft article 16 submitted by the Special Rapporteur read as follows:

> "Article 16. Conspiracy
>
> The following constitute crimes against the peace and security of mankind:
>
> (1) Participation in a common plan or conspiracy to commit any of the crimes defined in this Code.
>
> (2) First alternative
>
> Any crime committed in the execution of the common plan referred to in paragraph (1) above attaches criminal responsibility not only to the perpetrator of such crime but also to any individual who ordered, instigated or organized such plan, or who participated in its execution.
>
> Second alternative
>
> Each participant shall be punished according to his own participation without regard to participation by others."

two elements: first, agreement, that is the concordance of wills or an agreement between two or more individuals to commit a crime; and second, physical acts performed to carry out the crime planned. Paragraph (1) of the article incriminated the agreement as such, independently of any physical act. The object of that paragraph was dissuasion.

58. The second paragraph of the draft article raised the delicate question of possible collective responsibility; that was why he had proposed two alternatives. The first specified that criminal responsibility attached not only to the perpetrator, but also to any individual who ordered, instigated or organized a common plan or who participated in its execution. The second alternative, which was based on the concept of individual responsibility, provided that each participant would be punished according to his own participation, without regard to participation by others. The Special Rapporteur pointed out that the Nürnberg Tribunal had limited the application of the principle of collective responsibility for conspiracy to crimes against peace. In the case of war crimes and crimes against humanity, the Tribunal had, however, preferred the principle of individual responsibility. In the Special Rapporteur's view, more recent events showed that major crimes could no longer be regarded as acts committed by isolated individuals. Modern criminologists, while still persistently attached to the principle of personal criminal responsibility, tended to draw increasingly broad consequences from the collective nature of an offence.

59. Several members of the Commission supported the Special Rapporteur's inclusion in the draft Code of a separate provision on the notion of conspiracy. It was argued that in international criminal law, conspiracy was understood to mean a form of perpetration of certain international crimes. According to the Charters of the international military tribunals, participation in a common plan or in a conspiracy aimed at the preparation, initiation of waging of a war of aggression was a punishable offence. Similarly, conspiracy to commit genocide was punishable under article III (b) of the Convention on the Prevention and Punishment of the Crime of Genocide. Those members did not endorse the solution adopted by the Nürnberg Tribunal, which limited the notion of conspiracy to crimes against peace, whereas the

Commission, in its 1954 draft Code, had extended its application to all crimes against the peace and security of mankind. Genocide and apartheid, which were directed not against a State, but against ethnic, religious, racial, tribal or cultural groups, were precisely the type of crimes that could not be perpetrated by isolated individuals, but only by constituted groups, generally with the participation of a State, co-operating within the framework of a conspiracy having a common criminal objective. It was also pointed out that the notion of conspiracy, as applied to crimes such as aggression, referred to acts that were normally preparatory. Some national laws had chosen to make conspiracy a separate punishable offence. For example, in certain countries, the mere possession of plates intended for printing false banknotes constituted a crime in itself even if those plates had not been used in any way. Similarly, in certain countries, the mere possession of firearms was an offence. Moreover, many national laws punished as a separate crime the mere fact of participating in a common plan to perpetrate a crime, even if no crime had been committed. One member suggested that the creation or institution of the crime of conspiracy in national penal systems seemed to have evolved as a matter of public policy, due to the seriousness or frequency of the underlying crime or the difficulty of taking criminal proceedings against individual perpetrators and the same process might be envisaged on the international plane.

60. Some of the members who supported the inclusion in the draft Code of a separate provision on conspiracy thought that the relevant draft article should contain additional elements for a better definition of that notion, such as the criminal intent (mens rea) of each participant, agreement with another person and the attempt to execute the crime.

61. Other members believed that it was not really necessary to include in the draft Code a provision on conspiracy separate from that on complicity, since the two notions were very close to each other and often overlapped. In their view, conspiracy should be regarded simply as an aspect of participation in a crime. It was pointed out in that connection that while it was true that the Convention on the Prevention and Punishment of the Crime of Genocide treated

complicity and conspiracy separately, other instruments, such as the 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, dealt with them together.

62. With regard, more particularly, to the two alternative texts submitted by the Special Rapporteur for his draft article, several members thought the Commission should avoid engaging in a discussion on individual responsibility as opposed to collective responsibility. In internal criminal law, as in international criminal law, the principle was individual responsibility. It was true that the time had come to face the problem of organized crime, and not only in the case of crimes against peace. But the question that arose was that of the apportionment of responsibilities in the perpetration of such a crime. In any case, responsibility remained individual; it depended on the role played by the person concerned in the perpetration of the crime, even if it was aggravated by the existence of an organization within which the perpetrators acted. On that point, one member observed that if the Commission opted for the principle of individual responsibility embodied in the second alternative text, paragraph (2) would be superfluous, because the Code already contained a provision on individual responsibility.

63. One member stressed that the principle of individual responsibility should be treated to the fullest possible extent as the basic principle in the case of war crimes. The notion of conspiracy, if the Commission decided to include it in the draft Code, should apply only to crimes against peace and genocide, as provided in article III of the Convention on the Prevention and Punishment of the Crime of Genocide.

64. Several members saw no real contradiction between the principle of individual responsibility and that of collective responsibility. One member thought that the two alternative texts proposed for paragraph (2) were more in the nature of complementary provisions: the first defined the crime of conspiracy, while the second determined the degree of culpability and hence the penalties incurred by the various participants in the conspiracy. In his view, if the text of the draft article were recast on those lines, it would probably attract general approval. Each participant in a conspiracy was responsible not only for the acts he personally committed, but also for all

the acts committed collectively by all the parties to the conspiracy, even if he himself had not been present at the time of their commission. The degree of culpability and the penalty imposed should, however, be related to the participation of each individual in the execution of the common plan.

65. In the opinion of another member, a person should be held individually responsible for committing a crime under the Code if that person carried out an act which violated any of the provisions of the Code. There would be collective responsibility, apart from individual responsibility, when an individual conspired with others to commit an illegal act contrary to the Code, and when the perpetration of that act could be attributed both to a legal entity and to each of the individuals having participated in the decision-taking process or in the execution of the decision to commit an act in violation of the Code. The nature of the crime was of great importance for determining the type of criminal responsibility involved. Certain crimes such as aggression, genocide and apartheid could not be perpetrated by an individual; they required a group of participants or a collective participation. The tendency to broaden the field of application of collective responsibility for crimes against the peace and security of mankind was justified in his opinion. He proposed that conspiracy should be defined as the offence of two or more persons who decided to execute jointly a common plan aimed at committing any crime under the Code, and that the definition should specify that each of the offenders was guilty of conspiracy to commit that crime. In his view, such a definition would bring out more clearly the dual responsibility - individual and collective - involved in conspiracy, as conceived by the Special Rapporteur.

66. Referring to certain questions raised in the course of the discussion, the Special Rapporteur pointed out that conspiracy differed from complicity in that, in the case of conspiracy, no distinction was made between direct perpetrators and indirect perpetrators, perpetrators and co-perpetrators, or perpetrators and accomplices - all the participants were associated in the framework of a common plan and had jointly decided to commit the crime. Although the Nürnberg Tribunal had decided not to apply the notion of conspiracy to all crimes against the peace and security of mankind, the

1954 draft Code had extended that notion to all the offences it covered - a tendency which later became more marked in the conventions on genocide, _apartheid_, narcotic drugs and slavery adopted subsequently. It could therefore be affirmed that the notion of conspiracy had been finally recognized in international law and thus had its place in the Code, together with that of complicity, which had also been taken into account in those conventions.

67. Taking into account certain observations made during the discussion, the Special Rapporteur submitted a new version of draft article 16 29/ to the Commission.

(d) _Attempt_

68. In his eighth report, and in his presentation of draft article 17 on "attempt" 30/ the Special Rapporteur observed that the concept of attempt was not included in the charters of the international military tribunals or in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, drawn up by the International Law Commission. On the other hand, "attempt" was included in article 2, paragraph 13 (iv), of the 1954 draft Code. There again, however, the 1954 draft referred to "attempt" without defining it.

29/ The new version of draft article 16 submitted by the Special Rapporteur read as follows:

"_Article 16_. _Conspiracy_

"Participation in a common plan to commit any of the crimes defined in this Code constitutes conspiracy.

Conspiracy means any agreement between the participants to commit jointly a crime against the peace and security of mankind."

30/ The first version of draft article 17 submitted by the Special Rapporteur read:

"_Draft article 17_. _Attempt_

The following constitutes crimes against the peace and security of mankind:

Attempt to commit a crime against the peace and security of mankind."

69. In his view, the theory of attempt could be of only limited application in the case of crimes against the peace and security of mankind. It was difficult to see what form an attempt to commit an act of aggression could take, and how to distinguish between commencement of execution of an act of aggression and the act itself. The idea of an attempt at a threat of aggression was even more bewildering.

70. The Special Rapporteur considered, however, that the concept of "attempt" in that area should not be abandoned altogether. Most crimes against humanity, such as genocide and apartheid, consisted of a series of specific criminal acts, and in such cases attempt was entirely conceivable.

71. Several speakers supported the Special Rapporteur's decision to include attempt among crimes against the peace and security of mankind. While it was difficult to conceive of attempt in the case of crimes against peace, that did not apply to crimes against humanity. The Convention on the Prevention and Punishment of the Crime of Genocide included attempt among punishable acts. As to the crime of apartheid, an attempt might conceivably be made to murder or to inflict grievious bodily or mental harm on members of a racial group for the purpose of establishing and maintaining domination by one racial group over another and of systematically oppressing it.

72. These members neverthless considered that the draft article should be accompanied by a clear definition of the concept of attempt. Several members supported the definition provided by the Special Rapporteur in paragraph 70 of his report, which had not been included in the draft article. According to that definition, attempt meant "any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention".

73. In particular, some members pointed out that the concept of attempt comprised the following elements: (a) the intent to commit the crime in question; (b) an overt act towards its commission; (c) failure to commit the crime; and (d) the apparent possibility of committing it. In that context, it was noted that mere preparatory acts not followed by execution should not be treated as crimes.

74. Other members of the Commission expressed reservations about the inclusion of draft article 17 in the draft Code. In addition to the problems

raised by the definition of "attempt", and the doubts to which the applicablity of that notion to crimes against peace gave rise, the draft article was unnecessary; for if a criminal undertaking was halted before it was carried out there was certainly no need to call upon an international criminal court. In the view of these members, attempt should be punishable only if it was expressly covered by the provisions defining a particular crime or category of crimes. In some cases it would be necessary to specify, in regard to one or other of the crimes, that attempt was subject to a less severe criminal sanction than the completed crime.

75. Lastly, some members thought it would be difficult to review all the crimes covered by the Code in order to determine whether the concept of attempt could be applied to them. But it would also be unwise to specify as a general rule that attempt would be punishable in respect of all crimes against the peace and security of mankind. In the view of these members, if the Commission merely included the traditional definition of attempt in the general part of the Code, it would be for the court to determine in each specific case whether the concept of attempt was applicable.

76. The Special Rapporteur pointed out that the concept of attempt could be treated in several ways. Most criminal codes sought an element of intent and an element of gravity to distinguish between punishable attempt and non-punishable attempt, and left it to the courts to apply that general principle to specific cases. In view of the various comments made in the Commission concerning the draft article he had submitted in his eighth report, the Special Rapporteur submitted a new version of draft article 17 31/ to the Commission.

31/ The new version of draft article 17 submitted by the Special Rapporteur read:

"Article 17. Attempt

Attempt to commit a crime against the peace and security of mankind constitutes a crime against the peace and security of mankind.

Attempt means any commencement of execution of a crime against the peace and security of mankind that failed or was halted only because of circumstances independent of the perpetrator's intention."

2. International illicit traffic in narcotic drugs

77. In his eighth report, and in his presentation of draft articles X and Y on the crime of the international illicit traffic in narcotic drugs, 32/ the Special Rapporteur said that the Commission had invited him to submit a provision on that subject, 33/ and he was submitting two texts. One treated international traffic in narcotic drugs as a crime against peace and the other treated it as a crime against humanity. That twofold characterization took account of the opinions of several members of the Commission as reflected in paragraphs 205 to 209 of the said report and he thought it fully justified. For the wording of the draft articles, he had taken into account, *inter alia*, the United Nations Convention against Illicit Traffic in Narcotic Drugs and

---

32/ The first version of draft articles X and Y submitted by the Special Rapporteur read as follows:

> "Article X. Illicit traffic in narcotic drugs, a crime against peace
>
> The following constitute crimes against peace:
>
> (1) Engaging in illicit traffic in narcotic drugs;
>
> (2) Illicit traffic in narcotic drugs means any traffic organized for the purpose of the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, despatch, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the conventions which have entered into force."
>
> "Article Y. Illicit traffic in narcotic drugs, a crime against humanity
>
> The following constitute crimes against humanity:
>
> Any illicit traffic in narcotic drugs, in accordance with the requirements laid down in article X of this draft Code."

33/ Report of the International Law Commission on the work of its forty-first session (*Official Records of the General Assembly, Forty-fourth session, Supplement No. 10* (A/44/10), para. 210.

Psychotropic Substances of 19 December 1988. Draft article X (crime against peace) dealt with large-scale trafficking by associations or private groups, or by public officials, either as principals or as accomplices in the trafficking. Such trafficking could affect international peace by giving rise to a series of conflicts, for example, between the producer or despatcher State, the transit State and the destination State. The threat to international peace was even greater when organized groups infiltrated governments, so that the State itself became, in a way, the perpetrator of the internationally wrongful act. Accordingly, traffic in narcotic drugs carried out by isolated individuals and punishable under the national law of the country where it occurred was not covered by the draft article.

78. With regard to draft article Y (crime against humanity), the Special Rapporteur noted that international illicit traffic in narcotic drugs, while constituting a crime against peace, was also, and above all, a threat to humanity. As had been pointed out at the Commission's previous session, even where traffickers were in business for profit or were lured by the prospect of financial gain, their crimes were still detrimental to the health and well-being of mankind as a whole. Thus it was humanity that was threatened.

79. Several members of the Commission expressed their approval of the recognition as a crime, under the draft Code, of a problem now generally recognized as a scourge which posed a grave threat to mankind and which, in their view, should certainly be included in the draft Code.

80. Some members, however, thought that a single draft provision sufficed and that drug trafficking should be treated only as a crime against humanity. It was noted in that connection that, although the criteria for classification as a crime against peace, a crime against humanity or a war crime were obviously relative, it seemed indisputable that, in view of its many characteristics, the international illicit traffic in narcotic drugs clearly fell within the category of crimes against humanity since it was directed against all the peoples of the world and its physical result was the destruction of human life in all countries, thus acting against mankind as a whole. In the opinion of one member in particular, it would suffice to identify this crime as a crime against the peace and security of mankind.

81. Other members, however, supported the Special Rapporteur's preference for two separate draft articles. In their view, the illicit traffic in narcotic drugs, as a crime against peace, had a State aspect, either on an internal or international plane. It was because it threatened the stability of States or jeopardized international relations that it could be characterized as a crime against peace. Those parameters should be set out in the draft article which defined illicit traffic in narcotic drugs as a crime against peace. In the case of a crime against humanity, on the other hand, the State element was superfluous. Internal illicit traffic, which had grave consequences for the population, could, as a result of those consequences, be assimilated in some respects to a form of genocide. It did not directly threaten international peace or the stability of a Government, but it harmed large groups of the population: the point was thus to preserve the concept of humanity as such.

82. Several members thought that, whatever the Special Rapporteur's intention in drafting provisions might have been, it was not clear that only large-scale and extremely serious international drug trafficking should be made a crime. In the opinion of these members, the definition of this crime should have been accompanied by qualitative or quantitative particulars, for otherwise not only the great drug barons but also the small dealers would come under the Code. It was therefore essential to specify clearly the kind of traffic covered.

83. In the view of one member, the draft article should, like the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances cover every act connected with drug trafficking, including its financial aspect.

84. One member considered that the definition contained in draft article X, paragraph 2, was unnecessary. In his view, although the language was taken from article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, there was a difference between characterizing the offences covered by that article as crimes, in other words making them crimes under internal law, and raising them to the level of international crime.

85. As to making illicit traffic in narcotic drugs a crime, some members of the Commission stressed that attention should be focused on international co-operation. Such co-operation, rather than the self-help often resorted to unilaterally by certain States, should be the watchword.

86. With regard to the prevention and punishment of the illicit traffic in narcotic drugs, one member considered that it would be well to add to the list of crimes covered by the Code a new form of crime, narco-terrorism. At its previous session, the Commission on Human Rights had adopted a resolution entitled "Consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights", in which it stated its deep concern at the crimes and atrocities committed in many countries by irregular armed groups and drug traffickers and at the evidence of growing links between them. There were now grounds for thinking that the terrorist movements rife a few years previously in Europe had had links with drug traffickers at one time. The same was currently true in several countries of Latin America where that new form of crime constituted a real threat to society. What was involved was thus not only a crime against humanity but also a crime against peace, which should certainly be a crime under the Code.

87. The Special Rapporteur explained that he had submitted two separate draft articles on the subject because, first, the distinction between crimes against peace and crimes against humanity had apparently already been established by the Commission in its work on the draft Code and, secondly, because as some members had already pointed out, there were aspects of the illicit traffic in narcotic drugs which belonged to both those categories of crime.

88. He had duly taken account of the remarks made concerning the two draft articles. In the light of those comments, he submitted to the Commission new versions of draft articles X and Y. 34/

34/ The new versions of draft articles X and Y submitted by the Special Rapporteur read:

"Article X. Illicit traffic in narcotic drugs, a crime against peace

Any mass traffic in narcotic drugs organized on a large scale in a transboundary context by individuals, whether or not acting in association or private groups, or in the performance of official

3. Breach of a treaty designed to ensure international peace and security

89. When introducing the report of the Drafting Committee concerning its work on the draft articles of the Code, the Chairman of that Committee informed the Commission that the Drafting Committee had held a long discussion on draft article 17 concerning breach of a treaty designed to ensure international peace and security but had been unable to reach agreement. He indicated that the Committee had once again encountered the seemingly irreconcilable views which had prevented it from reaching agreement after long discussion at the forty-first session of the Commission. 35/ He further pointed out the difficulties the Committee would have in taking up the question again at future sessions of the Commission in the absence of clear guidelines on the direction it should take. 36/

90. The discussion in the Commission 37/ revealed a continuing divergence of views on the advisability of including in the draft Code a draft article on the subject. On the one hand, it was felt by some members that the importance of treaties designed to ensure international peace and security, such as arms

---

> functions, as public officials, and consisting, inter alia, in brokerage, despatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace."
>
> "Article Y. Illicit traffic in narcotic drugs, a crime against humanity
>
> Any mass traffic in narcotic drugs organized on a large scale, whether in the context of a State or in a transboundary context, by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, inter alia, in brokerage, despatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against humanity."

35/ See the statement of the Chairman of the Drafting Committee at that session (A/CN.4/SR.2136).

36/ For the statement of the Chairman of the Drafting Committee on draft article 17, see the summary record of the 2196th meeting of the Commission (A/CN.4/SR.2196).

37/ The Commission discussed the draft article at its 2196th to 2198th meetings (A/CN.4/SR.2196 to 2198).

control and disarmanent treaties, could not be ignored in the Code, particularly in the light of the inclusion of relatively less important questions. In the view of those members, a serious breach of such a treaty would, by definition, endanger peace and would be of universal concern, not merely a matter for the parties to the treaty.

91. Many members on the other hand were opposed to dealing with the topic in the Code. The reasons adduced in this respect included concerns that such an article would violate the principle of universality which must underlie the concept of crimes against the peace and security of mankind. Furthermore, the view was expressed that such an article would discriminate against States which had entered into the treaties concerned as compared to States which had not done so. The effect might be to discourage the conclusion of such treaties. The draft article was also criticized on the ground that it unjustifiably focused on treaty obligations and concern was expressed that such an article would raise fundamental questions of treaty law, for example, in the area of validity and interpretation of treaties, relations between parties to treaties and the question of treaties and third States. Finally, the general point was made that an article of such a controversial nature would have an adverse impact on the acceptability of the Code.

92. The Commission was therefore not able to agree on guidelines for the future work of the Drafting Committee on this question. It furthermore noted that if, at its next session, it was able to agree on such guidelines, for example on the basis of the debate in the Sixth Committee of the General Assembly, the Drafting Committee should revert to the article after the completion of its consideration of the other draft articles on the topic.

C. Question concerning the establishment of an international criminal jurisdiction

93. At its present session, the Commission, within the framework of the present topic, considered extensively the question concerning the possible establishment of an international criminal jurisdiction.

1. Terms of reference

94. Two main reasons led the Commission at its present session to an in-depth examination of this question, within the context of the draft Code of crimes against the peace and security of mankind.

95. On the one hand, the question concerning the draft Code's implementation and, in particular, the possible creation of an international criminal jurisdiction to enforce the provisions of the draft Code has always been foremost in the Commission's concerns on the topic. The Commission pronounced itself in favour of such a trial mechanism for the first time in 1950. 38/ When it resumed its work on this topic, in 1983, it included in its report to the General Assembly of that year's session the following paragraph: "Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission asks the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals." 39/

96. The question concerning implementation of the draft Code, including the possible establishment of an international criminal jurisdiction, also came up in the Commission's discussions at its thirty-eighth (1986), 40/ thirty-ninth (1987), 41/ fortieth (1988) 42/ and forty-first sessions (1989) 43/ and the Commission reiterated the above-mentioned inquiry to the General Assembly at its thirty-eighth (1986) 44/ and thirty-ninth sessions (1987). 45/

38/ See para. 105 below.

39/ Report of the International Law Commission on the work of its thirty-fifth session, Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10 (A/38/10), para. 69 (c) (i).

40/ Ibid., Forty-first session, Supplement No. 10 (A/41/10), paras. 146 to 148.

41/ Ibid., Forty-second session, Supplement No. 10 (A/42/10), paras. 29 to 36.

42/ Ibid., Forty-third session, Supplement No. 10 (A/43/10), para. 280, commentary to article 4.

43/ Ibid., Forty-fourth session, Supplement No. 10 (A/44/10), paras. 211 to 216.

44/ Ibid., Forty-first session, Supplement No. 10 (A/41/10), para. 185, footnote 100.

45/ Ibid., Forty-second session, Supplement No.10 (A/42/10), para. 67 (c), footnote 28.

97. In particular, when provisionally adopting on first reading, at its fortieth session, draft article 4 of the draft Code, concerning the "obligation to try or extradite", the Commission included in this provision a paragraph 3 stating that "the provisions of paragraphs 1 and 2 of this article do not prejudge the establishment and the jurisdiction of an international criminal court". Furthermore, in paragraph (5) of the relevant commentary, the Commission indicated that paragraph 3 of draft article 4 "deals with the possible establishment of an international criminal court" and "it shows that the jurisdictional solution adopted in draft article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court". 46/

98. Although the Commission never received from the General Assembly a clear-cut answer to the inquiries referred to in paragraphs 95 and 96 above, it is to be noted that in paragraph 2 of its resolutions 43/164 and 44/32 of 9 December 1988 and 4 December 1989, respectively, concerning the Draft Code of Crimes against the Peace and Security of Mankind, the Assembly "notes the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the Draft Code, and encourages the Commission to explore further all possible alternatives on the question".

99. It was on the basis of the above-mentioned considerations that the Special Rapporteur on the topic included in his eighth report submitted to the Commission at the present session (A/CN.4/430 and Add.1) a part III dealing with the "statute of an international criminal court". 47/

100. The other main reason which led the Commission at the present session to engage in an in-depth examination of this question was a specific request addressed to it by the General Assembly in resolution 44/39 of 4 December 1989 entitled: "International criminal responsibility of individuals and entities

---

46/ Ibid., Forty-third session, Supplement No. 10 (A/43/10), para. 280, draft article 4, para. 3 and para. (5) of the commentary.

47/ See para. 29 above, under "Consideration of the topic at the present session".

engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes". Paragraph 1 of this resolution reads as follows:

> "*The General Assembly*,
>
> ...
>
> 1. *Requests* the International Law Commission, when considering at its forty-second session the item entitled 'Draft Code of Crimes against the Peace and Security of Mankind', to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code of crimes, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote attention to that question in its report on that session;".

101. Consequently, a substantive portion of the discussion held by the Commission on the Special Rapporteur's eighth report on the topic (2151st to 2159th meetings) revolved around the question concerning the establishment of an international criminal court or other international criminal trial mechanism. At the conclusion to that discussion, the Commission decided to establish a working group with a mandate to draw up a draft response by the Commission to the request addressed to it by the General Assembly in paragraph 1 of resolution 44/39. After adoption by the Commission, the draft response would become part of its report to the General Assembly.

102. As to the question of "illicit trafficking in narcotic drugs across national frontiers", mentioned in General Assembly resolution 44/39, it was considered by the Commission in the context of its discussion of the eighth report of the Special Rapporteur. 48/ As indicated in paragraph 31 of the present report, the Commission provisionally adopted an article to be included in the Code which defines the illicit traffic in narcotic drugs as a crime against humanity.

48/ See paras. 77-88 above.

2. Previous United Nations efforts in the field of an international criminal jurisdiction

103. While considering this question, the Commission was aware of the fact that the Commission itself, as well as other United Nations organs, had been involved in the past in efforts tending towards the creation of some kind of an international criminal jurisdiction. These efforts, although they did not come to fruition for different reasons, could well provide the Commission with a useful background against which to gauge both the feasibility of an international criminal jurisdiction and the conditions under which it may be workable in today's world.

104. The Commission itself was at the centre of the first attempt by the United Nations to examine in depth the possible creation of an international criminal jurisdiction. The General Assembly, by resolution 260 B (III) of 9 December 1948, invited the Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions" and requested the Commission, in carrying out that task, "to pay attention to the possibility of establishing a criminal chamber of the International Court of Justice".

105. After considering the above request at its first (1949) and second (1950) sessions, the Commission decided that "the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable" and that "the establishment of the above-mentioned international judicial organ is possible". The Commission also decided "to state that it has paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute, the Commission does not recommend it". 49/

49/ See *Yearbook ... 1949*, Report of the Commission to the General Assembly, paras. 32 to 34, and *Yearbook ... 1950*, vol. II, Report of the Commission to the General Assembly, paras. 128 to 145, in particular, paras. 140 and 145.

106. After considering the Commission's report referred to above, the General Assembly, by resolution 489 (V) of 12 December 1950, set up a committee composed of representatives of 17 Member States for the purpose of preparing concrete proposals relating to the establishment and the statute of an international criminal court. This Committee, which met in Geneva in August 1951, completed a draft statute for an international criminal court to be established by means of an international convention. 50/

107. The report of the Committee as well as the draft statute was transmitted to Governments for their observations. By resolution 687 (VII) of 5 December 1952, the General Assembly, considering that few Member States had commented on the first Committee's report, decided to appoint a second Committee consisting again of representatives of 17 Member States, whose mandate was the following: (a) to explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done; (b) to study the relationship between such a court and the United Nations and its organs; and (c) to re-examine the draft statute.

108. This second Committee, which met in New York in July-August 1953, in addition to examining points (a) and (b) referred to above, made a number of changes in the draft statute of the 1951 Committee and, as regards several provisions of the draft, prepared alternative texts, one applying if the court were to be closely linked with the United Nations and the other appropriate if it were to be decided that the Court were to operate independently from the United Nations. 51/

109. On two successive occasions, however, the Assembly, by resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957, deferred consideration of the 1953 Committee's report, on the ground that, the question of an international criminal jurisdiction being closely linked both with the question of defining aggression and with the draft code of offences

---

50/ Official Records of the General Assembly, Seventh session, Supplement No. 11 (A/2136).

51/ Report of the 1953 Committee on International Criminal Jurisdiction, Official Records of the General Assembly, Ninth session, Supplement No. 12 (A/2645).

against the peace and security of mankind, consideration thereof should be postponed until the Assembly examined again the other two related questions. 52/

110. The other cases of United Nations involvement in the possible creation of an international criminal jurisdiction concern two specific conventions, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

111. Article I of the 1948 Convention categorizes genocide as "a crime under international law" and article VI thereof provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting Parties which shall have accepted its jurisdiction".

112. On various occasions, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, the Commission on Human Rights itself and the Economic and Social Council 53/ adopted resolutions mentioning the possibility of creating an international criminal court to implement article VI of the Genocide Convention, or ordering studies on the question of prevention and punishment of the crime of genocide, including the question of an international criminal jurisdiction. No actual draft has so far been recommended by these organs, however.

52/ By resolution 3314 (XXIX) of 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression. By resolution 36/106 of 10 December 1981, the Assembly invited the Commission to resume its work with a view to elaborating a draft Code of crimes against the peace and security of mankind. No mention was made, however, in either resolution of the question concerning the establishment of an international criminal jurisdiction.

53/ See documents E/CN.4/947, E/CN.4/Sub.2/286, p. 77, of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (1967, twentieth session); resolutions 7 (XX) of 3 October 1967, 8 (XX) of 10 October 1967 and 7 (XXIV) of 18 August 1971 of the said Sub-Commission; resolutions 10 (XXIV) and 9 (XXXV) of the Commission on Human Rights and Economic and Social Council resolutions 1420 (XLVI) of 6 June 1969 and 1983/33 of 27 May 1987.

113. For its part, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted by General Assembly resolution 3068 (XXVIII) of 30 November 1973, categorized *apartheid* as "a crime against humanity" (article I). Article V of this Convention states that persons charged with the crime of *apartheid* "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction". On the basis of this provision and of paragraph 20 of the Programme of Activities of the Decade for Action to Combat Racism and Racial Discrimination (General Assembly resolution 34/24 of 15 November 1979), the Commission on Human Rights, by resolution 12 (XXXVI) of 26 February 1980 requested the *Ad Hoc* Working Group of Experts on Southern Africa, in co-operation with the Special Committee against *Apartheid*, to undertake a study on the question of establishing the international jurisdiction contemplated in article V of the 1973 Convention against *Apartheid*. The Working Group, which met in Geneva in August 1980 and January 1981, produced an interim report to the Commission which contained a "Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of *Apartheid* and other International Crimes" as well as a "Draft Additional Protocol for the Penal Enforcement of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*". 54/

114. From its thirty-seventh session in 1981 onwards, the Commission on Human Rights has adopted a number of resolutions requesting the Secretary-General to invite States Parties to the *Apartheid* Convention and all Member States to submit their views and comments on the above-mentioned drafts 55/ as well as

---

54/ See document E/CN.4/1426 and the report of the Commission on Human Rights on its thirty-seventh session, *Official Records of the Economic and Social Council, 1981, Supplement No. 5*, documents E/1981/25 and E/CN.4/1475.

55/ Resolutions 5 (XXXVII) of 23 February 1981, 1982/8 of 25 February 1982, 1982/10 of 25 February 1982, 1983/9 of 18 February 1983, 1983/12 of 18 February 1983, 1984/5 of 28 February 1984 and 1987/7 of 28 February 1984 of the Commission on Human Rights.

drawing attention to "the need to strengthen the various mechanisms for combating *apartheid*, *inter alia*, through the establishment of an international penal tribunal as provided for in article V of the Convention". 56/

115. It should also be mentioned within this context of United Nations efforts in the field of an international criminal jurisdiction that at its 11th meeting, on 16 February 1990, the Committee on Crime Prevention and Control adopted decision 11/111 recommending that the Economic and Social Council transmit to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to be held at Havana from 27 August to 7 September 1990, a draft resolution entitled "Terrorist criminal activities" for action under item 5 (topic III) of its provisional agenda: "Effective national and international action against (a) organized crime, (b) terrorist criminal activities". Part F of the above-mentioned draft resolution reads as follows: 57/

> "F. *Codification of international criminal law and creation of an international criminal court*
>
> International criminal law should be codified and the work of the International Law Commission on various aspects of codification should be encouraged, in co-operation with the Committee on Crime Prevention and Control.
>
> The possibility of establishing a special penal jurisdiction within the International Court of Justice, or a separate international criminal court, should be considered. Such drafts as the 1951 and 1953 draft statutes for the establishment of an international criminal court and the 1980 draft statute for the establishment of an international jurisdiction to implement the International Convention on the Suppression and Punishment of the Crime of *Apartheid* should be considered. Also, the United Nations should encourage States to explore seriously the possibility of establishing such an international court under the auspices of the Organization, in which grave international crimes, and particularly terrorism, could be brought to trial. This goal could be achieved by the application of the principle of universal jurisdiction to certain particularly harmful and/or hideous crimes."

56/ Preamble to resolutions 1987/11 of 26 February 1987, 1988/14 of 29 February 1988, 1989/8 of 23 February 1989 and 1990/12 of 23 February 1990 of the Commission on Human Rights.

57/ Report of the Committee on Crime Prevention and Control on its eleventh session (5-16 February 1990) (E/1990/31-E/AC.57/1900/8), decision 11/111, Annex, paras. 31-32.

3. Discussion of the question by the Commission at the present session

116. Paragraphs 117 to 121 below contain a general discussion of the advantages and disadvantages, for the trial of crimes against the peace and security of mankind, of the possible establishment of an international criminal court as compared, in particular, to the system of universal jurisdiction based on prosecution before national tribunals. Paragraphs 123 to 151 contain an overview of the possible options and main trends evidenced in the Commission with regard to some very specific and significant areas related to the creation of an international criminal court. Paragraphs 152 to 154 deal with other possible international mechanisms for the trial of crimes against the peace and security of mankind.

(a) General considerations

117. The Commission has noted that a number of developments in international relations and international law have contributed to making the establishment of an international criminal court more feasible than when the matter had been studied earlier, although the Commission is aware that in the view of some States, the time may not be ripe for the establishment of such a court. It has now emerged that international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international peaceful relations. There have thus been increased calls for enhanced international co-operation to combat such crime. Of course, the final position of States would depend largely on the form that such a court would take and therefore the Commission has set out below the various forms in which the court could be conceived.

118. Proposals for establishment of a court must be seen against existing mechanisms for prosecuting international crimes. The system of universal jurisdiction exists for a large number of crimes, in some cases with the participation of a large number of States, and prosecution is carried out effectively in national courts. Proposals for a court must therefore take into account the danger of disrupting satisfactory implementation of the existing systems. The latter, however, depends wholly on the administration

of justice in individual national systems. A recognized advantage of an international court is the uniform application of the law with the best possible guarantees of objectivity to try these kinds of crimes.

119. A major concern with respect to the establishment of a court is its possible curtailment of national sovereignty, although it must be taken into account that existing régimes of universal jurisdiction also have an impact on the exercise of the competences of the State. Some Governments critical of universal jurisdiction refer to the fact that it makes national tribunals responsible for judging the conduct of foreign Governments. Considered in this context, and in the long term, the acceptance of the competence of an international criminal jurisdiction constitutes, on the contrary, the exercise by States of their sovereign competences.

120. In light of the fact that an international crime often involves more than one State and may relate to a dispute between States, the international court, in providing recourse to a third-party dispute mechanism, would contribute to the prevention and settlement of international conflicts and thus to the maintenance of international peace and security. In some cases, referring to the court a case against an individual could result in the case not being regarded as relating to an inter-State dispute.

121. Although concerns have been expressed that an international court could not be totally insulated from political currents, the Commission is convinced that its independence and integrity may be guaranteed by devising a structure with adequate safeguards. In any event the court could be expected to provide better safeguards against arbitrary proceedings and for the protection of the rights of the accused than the existing system of universal jurisdiction.

122. Sections (b) (iii) and (g) below discuss in more detail other possible means of implementation of the draft Code as well as possible systems of relations between an international court and national jurisdictions.

(b) Jurisdiction and competence

(i) Subject-matter

123. Three options appear to be possible:

(i) The court would exercise jurisdiction over the crimes defined in the Code.

(ii) The court would exercise jurisdiction over only some of the crimes defined in the Code.

(iii) The court would be established independently of the Code, to exercise jurisdiction over all crimes in respect of which States would confer competence upon it, particularly under existing international conventions.

124. As regards the first option, an argument in favour of limiting subject-matter jurisdiction to the crimes under the Code is that, in the Code, the crimes can be expected to be defined in a manner which meets the standards of criminal law, particularly the rule nullum crimen sine lege. Furthermore, restricting the subject-matter jurisdiction to the crimes under the Code would not preclude a possible later extension to other crimes. Another advantage of this option is that the Code would include only the most serious crimes as agreed to by the international community.

125. On the other hand, a possible disadvantage of this option would be that the court could not be established until the Commission's work on the draft Code has been completed.

126. The second option envisages the possibility that the court would, for reasons of practicability or acceptability, be granted competence over only some of the crimes defined in the Code, at least at the initial stage of its creation. This limitation could be implemented either in the Statute ab initio or through the provision of clauses allowing States to opt out of the court's jurisdiction. In this latter case, problems of reciprocity and universality could arise: if only some States agree to confer competence upon the court over certain crimes, these States would resort to the international criminal court, while other States would not, and would, for example, continue to prosecute these crimes through their national jurisdictions.

127. The main advantage of the third option is that it would entirely free the establishment of the court from any possible delay in the adoption of the Code.

(ii) Competence and jurisdiction over persons

128. The draft Code as being developed by the Commission is restricted in application to individuals (draft article 3). The question of extending the scope of the draft Code to States, although discussed, was left open for consideration at a later stage.

129. The possibility was also discussed of extending jurisdiction to legal entities other than States, at least for certain crimes, such as, for example, drug-trafficking.

(iii) Nature of jurisdiction

130. As to the nature of the court's jurisdiction, there are three possible options:

(i) an international criminal court with exclusive jurisdiction;
(ii) concurrent jurisdiction between an international criminal court and national courts;
(iii) an international criminal court having only a review competence.

Competence to provide legal opinions could also be envisaged as a complement to any one of these options.

131. In cases of exclusive jurisdiction by the court, individual States would refrain from exercising jurisdiction over the crimes falling under the competence specified for the court.

132. In the option of concurrent jurisdiction between an international criminal court and national courts, a State would choose whether to institute an action before a national court or before the international court. This possibility would detract from the advantages of uniformity of application. Under this option, means would also have to be devised to overcome difficulties which might arise if one party wished to initiate an action before a national court and another party wished it brought before the international court.

133. Under the third option, the court would have competence only to re-examine decisions of national courts on international crimes, where this becomes necessary.

134. As regards the possibility to endow the court with the competence to issue legal opinions on criminal matters, these could be, *inter alia*, requests for binding opinions from national courts or requests for advisory opinions from an organ of the United Nations. The court could be entrusted with the task of harmonizing the interpretation of international criminal law, leaving to national tribunals the function of deciding on the merits.

(iv) Submission of cases

135. On who may submit a case to the court, different options have been considered: (1) all States; (2) all States parties to the court's statute; (3) any State which has an interest in the proceedings, because (a) the crime is alleged to have been committed on its territory or directed against it; (b) the victim is its national; (c) the alleged perpetrator is its national; or (d) the accused is found on its territory; (4) intergovernmental organizations of a universal or regional character; (5) non-governmental organizations; (6) individuals.

136. Two possible restrictions on right of submission were discussed. The first was the possibility of requiring the consent of all States which have an interest in the case (as provided under option 3 above). The second was to require authorization either of the General Assembly or the Security Council of the United Nations.

137. The choice amongst these options related to the question of how limited the right to submit cases should be. As an example, the most limited access would result from a requirement that cases could only be brought by States parties to the Statute which have an interest in the case and subject to the consent of all other directly concerned States and authorization by either the General Assembly or the Security Council. The most liberal would be provided by granting the right of submission to any State, organization or individual.

(c) Structure of the court

(i) Institutional structure

138. The question whether there should be established a permanent court or an *ad hoc* court was addressed. The latter would raise questions of uniformity in the implementation of the Code.

139. The court could be established either: (1) by a separate convention; (2) within the framework of the convention adopting the Code; or (3) by an amendment to the Charter of the United Nations, for example, if the court were to be an organ of the United Nations. The question concerning the establishment of the court by a General Assembly resolution was also discussed.

140. Whatever the method of establishment, the relationship between the court and the United Nations would have to be clearly determined, both for reasons of general policy and with respect to institutional aspects as dealt with

elsewhere (e.g. appointment of judges, submission of cases and financing). The role of the Security Council in determining the existence of aggression under the draft Code (article 12 as provisionally adopted by the Commission at its fortieth session) should be noted.

(ii) Composition of court

141. It was presumed that the Court should be of moderate size and that the judges should represent the main legal systems of the world. The desirability of allowing for the formation of chambers was discussed. One idea was to try all cases in chambers allowing for review by the plenary court. The system of chambers in the International Court of Justice, allowing for some role for claimants in the selection of judges, was also considered.

(iii) Election of judges

142. Three options for the election of judges were considered: (1) in the same manner as the International Court of Justice; 58/ (2) by a qualified majority in the General Assembly of the United Nations; (3) by the parties to the statute of the court.

(iv) Organs charged with criminal prosecution

143. Different possibilities of a prosecuting attorney were envisaged. The role of such an attorney would vary depending on the various options for the court's jurisdiction as listed in paragraph 130 above. The options discussed were appointment of a prosecuting attorney and the establishment of an independent body associated with the court.

(v) Pre-trial examination

144. Various possible methods of pre-trial examination were discussed: one would entrust it to the court; others, to the prosecutor, or to a judge.

58/ The procedure for the election of members of the International Court of Justice is set out in articles 4 to 16 of the Court's Statute. They provide, *inter alia*, that the Court members shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration (article 4 (1)); that the General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court (article 8); and that no distinction will be made in the Security Council vote between permanent and non-permanent members (article 10 (2)). Those candidates who obtain an absolute majority in the General Assembly and in the Security Council shall be considered as elected (article 10).

(d) Legal force of judgements

145. With regard to the legal force of judgements in cases where there is concurrent jurisdiction and the international court has made a decision, it was envisaged that a national court could not re-examine the case. This conclusion was consistent with paragraph 1 of article 7 of the draft Code, as provisionally adopted by the Commission at its fortieth session.

146. As to the legal force of judgements in cases where a national court has taken a decision, re-examination by an international court could be envisaged, for example: (a) if a State concerned has grounds for believing that the decision was not based on a proper appraisal of the law or the facts; (b) if the acts were tried as ordinary crimes although they are characterized as crimes falling under the jurisdiction of the court (see, for example, paragraph 3 of article 7 of the draft Code); (c) in the case of an appeal by the convicted individual.

147. Certainly, if the court was established only to consider recourses against judgements handed down by a national court, its decisions would take precedence over the judgements of national courts.

(e) Other questions

(i) Penalties

148. The question of penalties was addressed in the context of the rule *nulla poena sine lege*. The options were to have either a general description of penalties or a specific penalty for each crime.

149. In addressing penalties, it was suggested that the penalty should be proportionate to the gravity of the crime committed. The possibility of excluding the death penalty was also suggested.

(ii) Implementation of judgements

150. A general discussion was held on the different aspects of implementation. There were basically two options. One would require an international detention facility. The other would provide for implementation under national systems, in which case the advantages and disadvantages of according priority to the State which submitted a case before the court need be considered.

(iii) Financing of the court

151. Two options for financing the court were considered, namely, by the parties to its statute or by the United Nations. The latter, which has the

advantage of guaranteeing greater efficiency and continuity in the financing of the court, presupposes that the majority of the members of the United Nations become, at the same time, parties to the statute of the court.

(f) Other possible international trial mechanisms

152. The understanding was reached that instead of establishing separate courts for different categories of crimes, as is provided for in relevant conventions, it would be preferable to have a single organ for international criminal justice.

153. The option of entrusting the International Court of Justice with jurisdiction in criminal actions against individuals was discussed. It was pointed out that such jurisdiction would require amendments to its statute. It would be necessary to obtain the views of the International Court of Justice on this option.

154. A proposal was made to complement national courts with judges from other legal systems, in matters of cases of international crimes. This proposal was not made as an alternative to an international court but, rather, as a transitional step to possibly overcome certain difficulties in the application of the system of universal national jurisdiction.

(g) Conclusions

155. The Commission's examination of the question reflected a broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court to be brought into relationship with the United Nations system, although different views were expressed as to the structure and scope of jurisdiction of such a court. There are at least three possible models varying mainly with respect to the competence and jurisdiction of the court.

(i) International criminal court with exclusive jurisdiction

- This would necessitate that States cede their criminal jurisdiction as regards crimes coming under the jurisdiction of the court.
- It may raise problems in relation to existing treaty obligations establishing universal jurisdiction under national tribunals.

- Recourse to a review procedure within the court's system has to be provided for. 59/
- It necessarily leads to the establishment of a system of pre-trial examination and of a public prosecutor. It also needs rules for the handing over of the accused to the court as well as an agreement on the establishment of an international detention facility and rules on enforcing the judgement.
- It also raises the question of reciprocity (States parties to the statute of the court, States not parties) and the question that the jurisdiction of the court may depend on the consent of the States concerned (territorial State, State whose national is accused, State where the accused is found).

(ii) Concurrent jurisdiction between an international criminal court and national courts

- States parties would not have to cede their national criminal jurisdiction but could decide on a case-by-case basis whether to submit a case to the international criminal court or exercise national jurisdiction. For instance, according to this model, some States may choose to exercise national jurisdiction in cases where their own nationals are involved, where the crime was directed against them or where the crime was committed in their territory.
- Such a system could lead to conflicts of jurisdiction between the States concerned.
- All the other aspects of model (a) will apply to model (b) (prosecution, appeal, handing over of the accused, implementation of judgements, reciprocity).

59/ Reference was made to article 14, para. 5, of the International Covenant on Civil and Political Rights.

(iii) An international criminal court having only a review competence

- States parties would not have to cede their national criminal jurisdiction.
- They would have to accept that judgements of their courts on crimes coming under the Code could be brought for review to the international criminal court.
- In addition to those who could bring a case before the court under the other two models, namely, other States concerned (territorial State, State whose national has been tried, States against which the crime was directed) or all States parties to the court's statute, this model could allow for the possibility of the convicted individual bringing a case.
- This model would not interfere with existing international obligations on universal jurisdiction; it would not require the consent of other States.
- It would not require a further procedure for appeal.
- It would establish a permanent international criminal court, the scope of which could be extended if States have gained some experience with the court and agree to do so.

156. It is possible to choose from amongst the various elements discussed in sections (b) to (e) for incorporation in each of the envisaged models. Each of the three models could also provide for the competence of the court to give legal opinions, if so requested, either binding or advisory, or both (see paras. 130 and 134 above).

157. Establishing an international criminal court would in the end be a progressive step in developing international law and strengthening the rule of law, and be successful, only if widely supported by the international community.

D. Draft articles of the draft Code of crimes against the peace and security of mankind

1. Text of draft articles provisionally adopted so far by the Commission

158. The texts of the draft articles provisionally adopted so far by the Commission are reproduced below.

CHAPTER I

INTRODUCTION

PART I. Definition and characterization

Article 1

Definition

The crimes [under international law] defined in this draft Code constitute crimes against the peace and security of mankind.

Article 2

Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

PART II. General principles

Article 3

Responsibility and punishment

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime irrespective of any motives invoked by the accused that are not covered by the definition of the offence and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

Article 4

Obligation to try or extradite

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article do not prejudge the establishment and the jurisdiction of an international criminal court. [60]

Article 5

Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

Article 6

Judicial guarantees

Any individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular:

1. He shall have the right to be presumed innocent until proved guilty;

2. He shall have the rights:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

---

[60] This paragraph will be deleted if an international criminal court is established.

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

Article 7

Non bis in idem

[1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]

2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(a) if the act which was the subject of the previous judgement took place on the territory of that State;

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

Article 8

Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

...

Article 10

Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

Article 11

Official position and criminal responsibility

The official position of the individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as Head of State or Government, does not relieve him of criminal responsibility.

CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

PART I. Crimes against peace

Article 12

Aggression

1. Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable to be tried and punished for a crime against peace.

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) Any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 13

Threat of aggression

Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

Article 14

Intervention

1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

2. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 15

Colonial domination and other forms of alien domination

Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 16

International terrorism

1. The undertaking, organizing, assisting, financing, encouraging or tolerating by the agents or representatives of a State of acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

2. The participation by individuals other than agents or representatives of a State in the commission of any of the acts referred to in paragraph 1. */

---

*/ Paragraph 2 will be reviewed in the light of the provisions on complicity and on crimes against humanity which will be examined by the Commission at a later stage.

Article 18 61/

Recruitment, use, financing and training of mercenaries

1. The recruitment, use, financing or training of mercenaries by agents or representatives of a State for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

  (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

  (ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

61/ For an explanation of the numbering of the article, see subsection 3 of section B above.

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Article X [62]

Illicit traffic in narcotic drugs

1. The undertaking, organizing, facilitating, financing or encouraging, by the agents or representatives of a State, or by other individuals, of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context.

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs shall include the acquisition, holding, conversion or transfer of property by a person who knows that such property is derived from the crime described in the present article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

2. Text of draft articles 16, 18 and X with commentaries thereto, as provisionally adopted by the Commission at its forty-second session [63]

PART I. Crimes against peace

Article 16

International terrorism

1. The undertaking, organizing, assisting, financing, encouraging or tolerating by the agents or representatives of a State of acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

---

[62] Corresponding to article Y as proposed by the Special Rapporteur (see para. 88 above). Article X proposed by the Special Rapporteur dealt with illicit traffic in narcotic drugs as a crime against peace.

[63] Contrary to article 12, paragraph 1, on aggression, articles 16 and 18 are at present confined to defining the acts constituting the crimes identified in these articles. Problems relating to the attribution of these crimes to individuals will be dealt with later in a general provision.

2. The participation by individuals other than agents or representatives of a State in the commission of any of the acts referred to in paragraph 1. [*]

Commentary

(1) Terrorism, as a crime against peace, was dealt with in the 1954 draft (article 2, paragraph 6), in these terms: "The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State."

(2) The object of the title of this article, "International terrorism", is to distinguish the terrorism in question from internal terrorism. International terrorism is terrorism organized and carried out by a State against another State, whereas internal terrorism is organized and carried out in the territory of a State by nationals of that State. Such terrorism comes under internal law, since it does not endanger international relations.

(3) Paragraph 1 defines the constituent elements of international terrorism, that is to say:

(a) The intervention of agents or representatives of a State.

(b) Such intervention must also consist of specific acts: organizing, assisting, financing or encouraging the terrorist activities; or tolerating terrorist activities in the territory of the State.

The word "tolerating" implies conscious acceptance of terrorist activity.

(c) Lastly, the acts in question must be of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

The expression "public figures" means not only political leaders, that is to say members of a Government, members of political assemblies or trade union leaders, but also other eminent persons who play an important part in the economic or social life of a country.

---

[*] Paragraph 2 will be reviewed in the light of the provisions on complicity and on crimes against humanity which will be examined by the Commission at a later stage.

(4) Paragraph 2 concerns the participation of individuals in acts of terrorism of agents or representatives of the State. It does not cover acts of terrorism committed by individuals which have no link with international acts of terrorism as defined in paragraph 1 of article 16.

Notwithstanding the proportion which the phenomenon has assumed nowadays, particularly in the framework of certain entities (terrorist organizations or groups, which are usually motivated by the desire for gain) and the danger which it represents for States, it has not seemed possible to consider terrorism by individuals as belonging to the category of crimes against peace, to the extent that such activities are not attributable to a State.

Paragraph 2 deals with terrorist activities in which individuals acting with the support of the State are involved. But the question arises whether, in such situations, the individuals concerned should not be considered as accomplices. This is why paragraph 2 will have to be re-examined in the light of the future provision on complicity. Furthermore, the Commission intends to revert to international terrorism by individuals when it examines provisions relating to crimes against humanity.

Article 18

Recruitment, use, financing and training of mercenaries

1. The recruitment, use, financing or training of mercenaries by agents or representatives of a State for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Commentary

(1) The 1954 draft Code did not deal with mercenarism. It should be noted however, that it contained a provision (article 2, para. 4) covering: "The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions."

(2) On the other hand, three other international instruments adopted during the last 25 years, contain important provisions on mercenarism. These are the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974); the 1977 Additional Protocol I to the Geneva Conventions

and the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (General Assembly resolution 44/34 of 4 December 1989). Under article 3 (g) of the Definition of Aggression (which served as a basis for the elaboration of paragraph 4 (g) of article 12 of the draft Code, provisionally adopted by the Commission at its fortieth session), 64/ the sending by or on behalf of a State of mercenaries which carry out acts of armed force against another State (or its substantial involvement therein) qualifies as an act of aggression under certain conditions. Article 47 of Additional Protocol I deals with the status of mercenaries, specifying that a mercenary shall not have the right to be a combatant or a prisoner of war. The 1989 Convention, on the other hand, established as offences the recruitment, use, financing and training of mercenaries and the direct participation by a mercenary in hostilities or a concerted act of violence.

(3) Paragraph 1 sets the scope and limits of the crime dealt with in the article. It makes clear first that the crime is not constituted by the activities of the mercenaries themselves but rather by the acts of recruiting, using, financing or training of mercenaries. Secondly, the only persons to whom the crime can be attributed are agents or representatives of a State. Thirdly, to fall under the definition, the acts must have one of two objectives: the mercenaries must be recruited, used, financed or trained either (a) for activities directed against another State, or (b) for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law. 65/ With respect to the clause "right of peoples to self-determination as recognized under international law", reference can be made to the terms of paragraph 7 of article 12 (Aggression), and to the use of the phrase "right of peoples to

---

64/ See Section D.1 above.

65/ Under article 5 of the 1989 Convention, the obligation of States not to recruit, use, finance or train mercenaries expressly encompasses an obligation not to recruit, use, finance or train mercenaries "for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law".

self-determination as enshrined in the Charter of the United Nations" in articles 14 (Intervention) and 15 (Colonial domination and other forms of alien domination). 66/

(4) Paragraph 2 defines the mercenary himself, following the definition of paragraph 1 of article 1 of the 1989 Convention. 67/ The definition refers to a person recruited to fight in an armed conflict.

(5) Paragraph 3, derived from paragraph 2 of article 1 of the 1989 Convention, defines an additional category of mercenaries, that is those recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State or undermining the territorial integrity of a State. The phrase "in any other situation" contrasts this category to that referred to in paragraph 2.

(6) In recent years, the activities of this kind of mercenaries have greatly increased in the third world.

Article X 68/

Illicit traffic in narcotic drugs

> 1. The undertaking, organizing, facilitating, financing or encouraging, by the agents or representatives of a State, or by other individuals, of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State of in a transboundary context.
>
> 2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs shall include the acquisition, holding, conversion or transfer of property by a person who knows that such property is derived from the crime defined in the present article in order to conceal or disguise the illicit origin of the property.

66/ See Section D.1 above and the commentaries to articles 14 and 15 (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10), pp. 182-187).

67/ See also the definition of mercenaries in paragraph 2 of article 47 of Additional Protocol I.

68/ As explained in the commentary, the Commission provisionally decided that this article should appear in the Part of Chapter II of the draft Code devoted to crimes against humanity.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

Commentary

(1) In adopting this draft article, the Commission has provisionally confined itself to illicit drug trafficking as a crime against humanity even though the Special Rapporteur had also submitted a draft article on illicit drug trafficking as a crime against peace. In characterizing traffic in narcotic drugs as a crime against humanity, the Commission wished to stress that the phenomenon is a danger for all mankind and to emphasize the fact that it is a threat not only to the public order of the country where it occurs, but also to the international community. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988 did not make this crime an international one, but it did give international or regional organizations competence for the prevention of illicit traffic and the pursuit of offenders (art. 10, paras. 1 and 2). Draft article X goes one step further by making the crime an international one, subject to certain qualifications. It provides that illicit traffic in narcotic drugs is no longer only a crime under internal law, but is also a crime against humanity. Although the title of the article refers only to narcotic drugs, paragraph 3 also deals with psychotropic substances, as defined in paragraph 2 of the 1988 Convention against Illicit Traffic in Narcotic Drugs.

(2) Paragraph 1 defines the crime, but some of the elements of the definition must be read in the light of paragraphs 2 and 3.

(3) With regard to the persons who may commit the crime, paragraph 1 refers to the agents or representatives of a State, as well as to private individuals. Since the draft article characterizes illicit traffic in narcotic drugs as a crime against humanity, it makes no difference whether the perpetrators are acting in the exercise of, or in connection with, functions assigned to them by a State or as private individuals. While it is true that narcotic drugs traffic is often engaged in by individuals, the possibility cannot be ruled out that agents of the State may facilitate or take part in such traffic. The term "individuals" includes persons acting for or on behalf

of organizations, associations and other bodies, such as "cartels", through or within which traffickers operate. It also covers persons acting in the framework of financial institutions, such as banks, investment companies, etc., which are used to move money or other assets deriving from illicit traffic in narcotic drugs.

(4) The draft article refers to the undertaking, organizing, facilitating, financing or encouraging of illicit traffic in narcotic drugs only "*on a large scale*". This idea involves a mass element. The draft article relates not to isolated or individual activities of small dealers, but, rather, to large-scale, organized operations.

(5) The words "within the confines of a State or in a transboundary context" indicate that the traffic does not have to be carried on in an inter-State context in order to constitute a crime against humanity. Internal traffic engaged in on a large scale may constitute a crime against humanity. It is even conceivable that it may be specially organized within a State for the purposes of impairing the physical integrity of members an ethnic, racial or other group and, in this case, its nature as a crime against humanity would be even more pronounced.

(6) *Paragraph 2* explains the meaning of the words "facilitating" and "encouraging" in paragraph 1. Its wording is based on article 3, paragraph 1 (b) (i), of the 1988 Convention and it covers, *inter alia*, what is commonly known as money laundering, as well as establishments involved in money laundering operations. The term "property" means all types of corporeal or incorporeal, movable or immovable and tangible or intangible assets, as well as legal instruments and documents proving ownership of such assets and the rights to which they give rise.

(7) The words "who knows that such property is derived from the crime defined in the present article in order to conceal or disguise the illicit origin of the property" exclude from the scope of the paragraph persons who, acting in good faith, may have taken part in one of the operations referred to in the paragraph, but who have no knowledge either of the illicit origin of the property or of the aim of concealing or disguising that origin.

(8) *Paragraph 3* explains the meaning of the words "illicit traffic in narcotic drugs". The list of operations it contains is taken from article 3,

paragraph 1 (a) (i), of the 1988 Convention. These operations relate both to illicit traffic in narcotic drugs and to illicit traffic in psychotropic substances.

(9) The words "contrary to internal or international law" emphasize the illicit nature of traffic in narcotic drugs. The phrase "international law" takes account of the existence of numerous international conventions concerning narcotic drugs. The reference to internal law, excludes from the scope of the draft article operations such as the production or import of narcotic drugs, inter alia, for the preparation of medicaments or for research purposes, which are lawful under the internal law of many countries.

CHAPTER III

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

159. The topic "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by the decision of the Commission at its thirtieth session, in 1978, 69/ on the recommendation of a Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

160. At its thirty-first session, in 1979, the Commission had before it the preliminary report of the Special Rapporteur, Mr. Sompong Sucharitkul. The Commission decided at the same session that a questionnaire should be circulated to States Members of the United Nations to obtain further information and the views of Governments. The materials received in response to the questionnaire were submitted to the Commission at its thirty-third session, in 1981.

161. From its thirty-second session (1980) to its thirty-eighth session (1986) the Commission received seven further reports from the Special Rapporteur 70/ which contained draft articles arranged in five parts, as follows: Part I (Introduction); Part II (General principles); Part III (Exceptions to State immunity); Part IV (State immunity in respect of property from attachment and execution); and Part V (Miscellaneous provisions).

162. At its thirty-eighth session the Commission adopted on first reading an entire set of draft articles on the topic, 71/ which was transmitted, in

---

69/ *Yearbook ... 1978*, vol. II (Part Two), pp. 152-155, paras. 179-190.

70/ For these seven further reports (the second through eighth reports) of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357; *Yearbook ... 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1; *Yearbook ... 1984*, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2; *Yearbook ... 1985*, vol. II (Part One), p. 21, document A/CN.4/388; *Yearbook ... 1986*, vol. II (Part One), pp. 8-22, document A/CN.4/396.

71/ *Yearbook ... 1986*, vol. II (Part Two), pp.7-22.

accordance with articles 16 and 21 of the Commission's statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.

163. At its thirty-ninth session, the Commission apppointed Mr. Motoo Ogiso Special Rapporteur for the topic. At its fortieth session, the Commission had before it replies which had been received from Member States and Switzerland (A/CN.4/410 and Add.1 to 5). The Commission also received a preliminary report from the Special Rapporteur (A/CN.4/415 and Corr.1 and 2).

164. At its forty-first session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/422 and Corr.1 and A/CN.4/422/Add.1 and Corr.1), as well as the preliminary report submitted to its fortieth session, for the purpose of conducting the second reading of the draft articles. After discussion of these reports, the Commission decided to refer draft articles 1 to 11 *bis* to the Drafting Committee, together with the proposals made by the Special Rapporteur, as well as those made by some members in plenary during the discussion. The Commission was unable to conclude its discussion of draft articles 12 to 28 and decided to give further consideration to these articles at its forty-second session.

B. Consideration of the topic at the present session

165. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/431 and Corr.1). In that report, the Special Rapporteur reviewed once again the entire set of draft articles and suggested certain reformulations, taking into account the views expressed by members of the Commission at its forty-first session, 72/ as well as by Governments in their written comments and in the Sixth Committee of the General Assembly at its forty-fourth session 73/

166. The Commission considered the Special Rapporteur's third report at its 2158th to 2161st meetings. After hearing the introduction of the report

---

72/ See *Official Records of the General Assembly, Forty-fourth session, Supplement No. 10* (A/44/10), paras. 403-613.

73/ See A.CN.4/415 and Add. 1-5, and A/CN.4/L.443, paragraphs. 213-262.

by the Special Rapporteur, the Commission resumed its consideration of draft articles 12 to 28, including the title of Part III. At the 2162nd meeting, the Commission decided to refer those articles to the Drafting Committee, together with the proposals of the Special Rapporteur as well as those submitted in the Plenary.

167. The Drafting Committee dealt with 16 of the 28 articles, but, due to lack of time, was not able to consider the remaining articles. Those articles provisionally adopted by the Drafting Committee on second reading were: article 1 (Scope of the present article); article 2 (Use of terms) 74/; article 3 (Privileges and immunities not affected by the present articles); article 4 (Non-retroactivity of the present articles); article 5 (State immunity); article 6 (Modalities for giving effect to State immunity); article 7 (Express consent to exercise of jurisdiction); article 8 (Effect of participation in a proceeding before a court); article 9 (Counter-claims); article 10 (Commercial transactions); 75/ article 12 (Contracts of employment); Article 13 (Personal injuries and damage to property); article 14 (Ownership, possession and use of property); article 15 (Intellectual and industrial property); and article 16 (Fiscal matters). In view of the fact that the second reading could not be concluded and a number of provisions were still pending, the Commission agreed that a detailed discussion of the articles adopted so far by the Drafting Committee would not serve any useful purpose. It accordingly decided to defer the final adoption of the above articles until after the completion of the remaining articles and to confine itself at the present session to taking note of the oral report of the Chairman of the Drafting Committee as reflected in the relevant summary records. 76/ In accordance with the statute of the Commission, the entire set

---

74/ The Drafting Committee deferred the adoption of paragraph 1 (b) (iii) *bis* of article 2 pending the adoption of article 11 (initially submitted by the Special Rapporteur as article 11 *bis*)

75/ The Commission combined articles 2 and 3, provisionally adopted on first reading, into new article 2 and renumbered original draft articles 4 to 11 as draft articles 3 to 10.

76/ A/CN.4/SR.2183.

of articles as formally adopted by it is expected to be submitted to the General Assembly at its forty-sixth session, together with commentaries.

168. The following paragraphs reflect the comments and proposals that members made on the title of Part III and draft articles 12 to 28, as well as those made by the Special Rapporteur at the forty-second session of the Commission. As regards the comments and proposals of the Special Rapporteur on draft articles 1 to 11 bis 77/ only a few members expressed opinions on them in plenary, mainly because other members had already expressed their views at the previous session. One member was of the opinion that the scope of the draft articles should be expanded to cover not only immunity of a State from the jurisdiction of a court of another State, and measures of constraint, as proposed by the Special Rapporteur, but also to immunity from the jurisdiction of legislative bodies or institutions of another State, and suggested that articles 1 and 5 (original article 6 (State immunity)) should be amended to that effect. Concerning the newly-combined article 2 (Use of terms), one member supported the proposal of the Special Rapporteur to change the words "commercial contract" in paragraph 1 (c) to read "commercial transaction". The same member, on the other hand, expressed doubts about the Special Rapporteur's proposal concerning paragraph 3 of the newly-combined article 2, which was to use the nature of a transaction as the primary test for determining whether or not the transaction was commercial but also to allow the forum court to take a governmental purpose into account. It was held that the proposed reformulation still begged the fundamental question of the relevance of an asserted governmental purpose of a transaction which was by its nature commercial, and that any reference to the purpose of a transaction would merely confuse the issue. Two other members commented on the said proposal of the Special Rapporteur, one in support of the proposed reformulation, and the other opposing it as it considerably reduced the importance to be attached to the purpose of a contract.

77/ For the texts of these articles, see the third report of the Special Rapporteur (A/CN.4/431 and Corr.1), pp. 5-21.

169. As regards article 5 (original article 6 (State immunity)), the deletion of the bracketed phrase "and the relevant rules of general international law" proposed by the Special Rapporteur was supported by two members. It was said that the deletion of the phrase would eliminate the possibility of unilateral interpretations of international law by domestic courts; it was also pointed out that there would always be room for the application of new rules of international law with or without that reference in the present draft articles. Some other members, however, considered it preferable that no decision on the wording of this draft article and of the title of Part II be taken until after the completion of the second reading of the remaining articles, particularly of Parts III and IV.

170. Concerning article 10 (original article 11 (Commercial contracts)) one member stated that he would have preferred a reformulation of the article which did not include any reference to the applicable rules of private international law. The text recommended by the Special Rapporteur was, in his view, somewhat eclectic and left room for a good deal of uncertainty. In that connection, he recalled that the business community had in the past deplored the frequent inclusion of similar vaguely worded references in international agreements. In his view, it would be preferable if paragraph 1 of the article referred to international agreements concerning choice of jurisdiction or to clauses designating the governing law, and he asked the Special Rapporteur and the Drafting Committee to consider that suggestion. As to article 11 bis (Segregated State property), 78/ the same member was concerned that it did not cover a situation in which, even if the State enterprise was engaged in a commercial transaction as defined in the article, differences arose regarding the contract as a result of acta jure imperii. Neither article 10 nor article 11 bis would seem to cover that possibility. Two members, however, supported article 11 bis as reformulated by the Special Rapporteur: one member stated that he was particularly happy with the Special Rapporteur's new text which put the question of the immunity or lack of immunity of the State

---

78/ The term "segregated State property" refers to a distinct category of property recognized in certain legal systems.

and State enterprise in its proper perspective; another member emphasized the importance of the question of segregated State property for all States, since every State in the world had economic relations with States such as the USSR and China, where segregated State property played, to varying degrees, a considerable role, and that the proposed provisions on this question would facilitate the establishment of close economic relations in the interest of all States. In this connection, the attention of the Commission was drawn to the process of reconstruction in progress in the Soviet Union and, in particular, the adoption of a new law on property and economic reforms involving the introduction of a market economy.

171. Commenting on the draft articles as a whole, one member noted the opposing viewpoints of members as regards the general principles of State immunity and expressed doubts that those views could be reconciled either in the Drafting Committee, or in the Sixth Committee or at a diplomatic conference, since they reflected differences of substance.

1. Part III. [Limitations on] [Exceptions to] State Immunity

172. The Special Rapporteur proposed, with a view to reaching agreement on the title of Part III, a neutral formulation which might read "Activities of States to which immunity does not apply", or, as suggested by one member at the previous session, "Cases in which State immunity may not be invoked before the court of another State". If there was no support for any such formulation, he said, the subject should be decided upon at the conclusion of the consideration of the present articles.

173. During the Commission's discussion of the topic, some members expressed support for a neutral formulation of the title along the lines suggested by the Special Rapporteur. One member in this connection proposed an alternative proposal to amend the title to read: "Activities of States in respect of which States agree not to invoke immunity".

174. In the light of the above, and considering that no member had opposed the adoption of a neutral formulation, the Special Rapporteur suggested that the Drafting Committee should be entrusted to work out a generally acceptable wording for the title of Part III.

Article 12. Contracts of employment 79/

175. The Special Rapporteur recalled that divergent views had been expressed on this draft article. Some members of the Commission, as well as some delegations in the Sixth Committee and one Government in its written comments, had suggested the deletion of the article. In their view, those labour law disputes envisaged in the present text were normally settled by mutual agreement or by insurance coverage. It was further suggested that the scarcity of judicial practice or evidence of State practice would not justify the inclusion of the provision. Others, however, considered the draft article

---

79/ The text, as provisionally adopted on first reading by the Commission, read as follows:

"Article 12. Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority,

(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual,

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded,

(d) the employee is a national of the employer State at the time the proceeding is instituted,

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding."

important, pointing out that local courts were the only convenient forum to provide effective remedies to certain categories of employees of a foreign State.

176. The Special Rapporteur noted that there was in fact no uniformity in national legislation in this field. 80/ Draft article 12 adopted on first reading, which appeared to be based on the United Kingdom Act and the European Convention on State Immunity, 81/ laid down the rule of non-immunity of a foreign State in a proceeding which related to a contract of employment between the State and an individual for work performed in the territory of the forum State with certain exceptions to that rule. The question to be examined, according to the Special Rapporteur, was whether those exceptions were so extensive as practically to negate the non-immunity principle, which he assumed to be generally accepted. The Special Rapporteur had previously made two proposals in his preliminary report which had the effect of narrowing the scope of the exceptions to the rule of non-immunity, namely to delete the reference to the social security requirement in paragraph 1 82/ and to delete subparagraphs (a) and (b) of paragraph 2. 83/

177. The deletion of the social security requirement was proposed by the Special Rapporteur in response to the view expressed that not all States had a social security system for their work force. As regards the deletion of subparagraph (a) of paragraph 2, the Special Rapporteur had suggested it since, according to the views of some members and Governments, the category of persons covered by this provision was too broad, for it would make the rule of

---

80/ The United Kingdom State Immunity Act of 1978, section 4, contained detailed provisions on the subject-matter, which were followed closely in the State Immunity Act of Singapore of 1979 and the State Immunity Ordinance of Pakistan of 1981; the United States Foreign Sovereign Immunities Act of 1976 and the State Immunity Act of Canada, on the other hand, contained no such specific provisions. The European Convention on State Immunity of 1972 contained detailed provisions in its article 5.

81/ A/CN.4/431, p. 24, footnote 6.

82/ A/CN.4/415 and Corr.1 and 2, p. 74, para. 7.

83/ *Ibid*., para. 8.

non-immunity established under paragraph 1 inapplicable in respect of all employees who had been recruited to perform services associated with (fairly liberal interpretation might be given to the words "associated with") the exercise of governmental authority. The Special Rapporteur was, however, of the view that subparagraph (a) was mainly intended to exclude administrative and technical staff of a diplomatic mission from the application of paragraph 1, the effect of which might not be achieved under article 3. Accordingly, he withdrew his proposal to delete subparagraph (a) in favour of an alternative text to subparagraph (a) which would limit the exception by requiring the employee to be a member of the administrative or technical staff of a diplomatic or consular mission. The proposed text would read:

> "(a) The employee is administrative or technical staff of a diplomatic or consular mission who is associated with the exercise of governmental authority:"

As to the deletion of subparagraph (b), the Special Rapporteur agreed to the view previously expressed by some members and Governments that, if immunity could be invoked before the proceedings of the court relating to recruitment, renewal of employment or reinstatement, little would remain to be protected by the local court. 84/ The reference to "recruitment" raised a particularly difficult problem; in the case where there were requirements under local labour law for non-discrimination in respect of recruitment, the State of the forum might have an overriding interest to determine the violation of that requirement in the local court. In this connection a suggestion was made both in the Commission and in the Sixth Committee to the effect that the word "recruitment" be changed to "appointment". The Special Rapporteur stated that in any event he wished to keep the matter open pending further discussion in the Commission.

178. During the Commission's discussion of the topic at this session, all the members who spoke on the article, with the exception of one member, appeared to support the retention of the provision in some form so that an employee of

---

84/ Ibid., and Report of the International Law Commission on the work of its forty-first session (Official Records of the General Assembly: Forty-fourth session, Supplement No. 10 (A/44/10)), para. 512.

a foreign State, since he would have no other effective recourse, might be allowed to bring action against that State in a court of another State where his service was performed. One other member, while supporting the retention of the article, pointed out that the article raised many issues. He recalled that in the past States had consistently granted immunity from claims brought by employees of a diplomatic mission employed in the work of the mission, the main reason for doing so being that working for a foreign State involved participation in the public functions of that State and that hearing of the complainant was likely to involve investigation of governmental functions. Most cases adjudicated in the past had fallen outside the category of governmental activity and involved employees working in semi-governmental institutions, such as cultural agencies and the like; in such cases, jurisdictional immunity clearly could not be claimed. On the other hand, where employees were recruited to work for a governmental institution or for the Government itself, their activities were considered to be governmental functions and the prerogatives of Governments were, by and large, respected. With those considerations in mind, he preferred the version adopted on first reading to the text recommended by the Special Rapporteur.

179. One member drew attention to the fact that while it was true, as the Special Rapporteur had pointed out, that United States legislation had no specific provision on contracts of employment, there was no doubt that such contracts were covered by the general commercial activity exception in section 1605 (a) 2 of the Foreign Sovereign Immunities Act. The legislative history of the Act made that point clear; contracts of employment were not mentioned, simply because the entire approach was different from that taken in the draft.

180. There was general support for deleting the reference to the social security requirement in paragraph 1. One member, however, considered that the reference should be retained, as difficulties often arose in that connection. In his view, the words "which may be in force" made it clear that States that did not have a social security system would not on that account be required to introduce one. As regards paragraph 2, subparagraph (a), the opinion of members was divided; some members supported the Special Rapporteur's

alternative text which was more limited in scope, whereas other members preferred either the deletion of subparagraph (a) or the general language of the text adopted on first reading.

181. Views were also divided on paragraph 2, subparagraph (b). Some members, supporting the view expressed by the Special Rapporteur, suggested the deletion of the word "recruitment" or the deletion of the entire provision. One member considered that the provision might not be necessary in the light of draft article 26 concerning State immunity from measures of coercion, since the latter article would provide that a State could not be forced by a court of the State of the forum to employ, or to retain in its employment, or to re-employ, a particular individual. Some other members, however, insisted on the retention of subparagraph (b), including the word "recruitment" which, it was maintained, was consistent with the established rules of international law. Recruitment, according to one member, could not be challenged in court, for the State's freedom to decide whether or not to hire or to renew employment should not be questioned. In his view, only a problem of failure to respect the rights granted to the employee by the contract of employment could be referred to the court.

182. The Special Rapporteur suggested that one solution might be to specify that, when the proceeding related to the recruitment, renewal of employment or reinstatement of an individual, it should be allowed only in so far as it was aimed at ensuring pecuniary compensation, but without allowing the court to issue an injunction against the foreign State.

183. With regard to paragraph 2, subparagraph (c), one member suggested the deletion of the words "nor a habitual resident". In his view, a national of a State residing abroad should still be treated like any other national of the State, with all the legal consequences deriving from that status.

184. Taking into account the above discussion, as well as the discussion at the previous session on this article, the Special Rapporteur proposed to retain draft article 12, with the deletion of the reference to the social security requirement in paragraph 1. As to subparagraphs (a) and (b), the Special Rapporteur suggested that further consideration be given to them by the Drafting Committee.

Article 13. Personal injuries and damage to property [85]

185. The Special Rapporteur noted that the draft article was generally conceived as a provision relating to non-commercial tort and liability of a State to pay monetary compensation for the damage caused by an act or omission attributable to that State. He observed that, as in the case of article 12, views of members of the Commission on this article had been divided so far: some members had proposed the deletion of the entire article since, in their view, it was based on the legislation of a few States and such cases could in any event be settled through diplomatic channels; some others had expressed concern that, if the act or omission which caused the injury or damage was attributable to a State, a question of State responsibility would arise, and the matter could be resolved only on the basis of international law and not of national law. It had also been pointed out that the provision would create inconsistency between jurisdictional immunities enjoyed by a State under the draft articles and those enjoyed by diplomatic agents representing the State under the relevant international agreements in force, and that the provision made no distinction between sovereign acts and private law acts. Still others had held the view that disputes of this nature were not uncommon and that diplomatic protection was not a viable alternative as a practical matter.

186. Considering such differences of views, the Special Rapporteur had earlier made three suggestions. First, the addition of a new paragraph which would read "Paragraph 1 does not affect any rules concerning State responsibility

---

[85] The text, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 13. Personal injuries and damage to property
>
> Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible propertry if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission."

under international law"; secondly, the deletion of the phrase "if the author of the act or omission was present in that territory at the time of the act or omission"; and thirdly the narrowing down of the scope of the article mainly to cover pecuniary compensation arising out of traffic accidents involving State-owned or State-operated means of transport and occurring within the territory of the forum State. With regard to his first suggestion, there was, at the previous session, neither opposition nor clear support; on the second, some members had expressed reservations with regard to the proposed deletion; and on the third, the views of members had also been divided: it had been remarked that general practice was to settle the matter through insurance, although it had also been pointed out that insurance did not always cover the full risk involved. In the light of these discussions at the previous session, the Special Rapporteur now wished to revert to the text adopted on first reading and to ascertain whether the concept of non-commercial tort itself was acceptable to the Commission.

187. During the discussion held in the Commission on the topic, most of the members who spoke on the article were in favour of retaining it. It was said that without this exception to State immunity, an injured individual would as a practical matter be without remedy, for in nearly all cases of personal injury and damage to property, diplomatic protection would probably be unavailable. As a matter of international human rights law, individuals must have some effective recourse. One member, however, favoured the deletion of the article, stating that exceptions to State immunity should be kept to a minimum. In his view, the exception was not necessary, because cases of domestic law violations were normally settled by insurance or through diplomatic channels.

188. Some other members, while not entirely opposed to the inclusion of a provision on this matter, expressed concern that the text of the article adopted on first reading might be prejudicial to the question of State responsibility. Difficulties arose, according to one member, from the fact that in the first place the article provided for the possibility that a court might attribute to a foreign State an act or omission of a physical or legal person, distinct from that State, who was present in the territory of the forum State at the time of such an act or omission, and declare that State to

be responsible. In his view, the regulation of legal relations in connection with compensation for damage was outside the scope of the present article. Secondly, it was said, an unlawful act or omission of a State was to be determined through international procedures in accordance with the rules of international law, and could not be determined by national courts. Another member was similarly concerned that the article at first sight might imply that there was a question of international responsibility of a State, whereas in fact the scope of application of the article was limited to the determination of responsibility by reference not so much to the rules of international law as to the rules of municipal law applied by the court of the forum State, pursuant to lex loci delicti commissi. In this connection, one member indicated that he could accept the article only on condition that a new paragraph 2 was added, reading "Paragraph 1 does not affect rules concerning State responsibility under international law".

189. Concern was also expressed that, under the terms of the article, the State would have a narrower immunity than that conferred on its own diplomatic agents under article 31 of the 1961 Vienna Convention on Diplomatic Relations. The view of one member was that the current version of article 13 was in complete contradiction with article 31 of the Vienna Convention. Another view, however, was that there was no contradiction, as was suggested, between the provision of article 13 and that of article 31 of the Vienna Convention on Diplomatic Relations. Although the Vienna Convention provided for various immunities for diplomatic and consular premises and personnel, it contained nothing to make a foreign State immune from the courts of the State of the forum itself with respect, for example, to actions arising out of commercial contracts between a State and a private person or out of torts. A further view was that the problem concerning the article was that it contained a number of related notions without clearly distinguishing them. The article spoke only of the State, not of diplomats, and of an act or omission "attributable to the State", a distinction that must be made clear.

190. Different views were also expressed as to the scope of the article; some members supported the idea that the application of the article be limited to pecuniary compensation arising from traffic accidents, while one member opposed it. Concerning the reference to the so-called "presence requirement",

there was general support for the retention of the phrase "if the author of the act or omission was present in the territory at the time of act or omission". One member suggested that, if the draft article were maintained, the expression "act or omission which is alleged to be attributable to the State" should be redrafted in more precise terms and the subjects and objects of the regulation should be defined more clearly in the light of comments by Governments and by members of the Commission.

191. The Special Rapporteur suggested that these points should be taken into account in the Drafting Committee.

Article 14. Ownership, possession and use of property 86/

192. In the light of the views expressed at the previous session of the Commission and in the comments of Governments, the Special Rapporteur proposed the deletion of paragraph 1, subparagraphs (c), (d) and (e), which represented mainly the practice of common law countries.

86/ The text, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 14. Ownership, possession and use of property
>
> 1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:
>
> (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or
>
> (b) Any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or
>
> (c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or
>
> (d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding-up; or

READEX FICHE

193. Most members who spoke on the article supported the recommendation of the Special Rapporteur. It was generally said that these provisions did not reflect universal practice and therefore were not appropriate for a general convention. It was also suggested that they might open the door to foreign jurisdiction even in the absence of any link between the property and the forum State. One member, however, cautioned against accepting the proposal to delete the subparagraphs without thinking through the effects of such a deletion. In his view, the cases in question, in respect of which there should certainly be no immunity, did not seem to be covered by other more general provisions; the Commission should therefore either retain them or add some general provisions. Another member, while agreeing to the Special Rapporteur's suggestion for the deletion of terminology which was not universally accepted, hoped that the underlying concept, which was universally valid, would not be lost in consequence.

194. Two members were also concerned that subparagraph (b) of paragraph 1 might allow jurisdiction of a foreign court, even if there was no link between the property and the forum State, and suggested that wording be included, as in paragraph 1 (a), to provide that the property was situated in the forum State. Another member felt that paragraph 1 (b) should be deleted.

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by _prima facie_ evidence."

195. With regard to paragraph 2, some members suggested the deletion of the entire provision which appeared to be a duplication or otherwise a contradiction of the provision in paragraph 2 of article 6 (original article 7: Modalities for giving effect to State immunity).

196. The Special Rapporteur suggested that these points should be taken into account in the Drafting Committee.

Article 15. Patents, trade marks and intellectual or industrial property [87]

197. The Special Rapporteur noted that one Government, in its written comment, requested the addition of a plant breeder's right. With a view to meeting that request, he proposed to amend subparagraph (a) to read "... copyright or any other form of intellectual or industrial property, including a plant breeder's right". The addition of the phrase "a right in computer-generated works" in the same paragraph was also suggested by the Special Rapporteur, taking into account the recent technical developments in that field. The latter phrase was to be understood to include, *inter alia*, computer programming and semiconductor chip layouts.

198. Those additional references to a plant breeder's right and to a right in computer-generated work met the approval of several members, one of them, however, suggesting that the nature and scope of those rights should be made clear in the commentary. Some other members were, however, not convinced that

---

[87] The text, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 15. Patents, trade marks and intellectual or industrial property
>
> Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:
>
> (a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or
>
> (b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum."

such special references were justified. They felt that, since any type of listing could not be exhaustive, it was better to find general wording which would also cover those rights, or make such specific references in the commentary. Two members associated themselves with the view that article 15 was applied only to the commercial use of patents or trade names in the forum State and not in connection with the determination of the ownership of such rights. Even with that qualification, however, the article was considered strictly unnecessary by one of them, since the problems it set out to resolve were of a highly technical nature and should be left to specialized international conventions, such as the Convention establishing the World Intellectual Property Organization. The suggestion was also made that subparagraph (b) should be deleted, since the words "alleged infringement" were so broad as to pave the way for abuse.

Article 16. Fiscal matters 88/

199. The Special Rapporteur noted that no question of substance had been raised concerning the article, except for one proposal which was to reformulate the article along the lines of article 29, paragraph (c), of the European Convention on State Immunity, reading: "The present articles do not apply to proceedings concerning customs duties, taxes or penalties".

200. There was wide support for the retention of the article, although two members suggested its deletion. One member was in favour of a simplified formulation based on the wording of article 29, paragraph (c), of the European Convention on State Immunity.

201. The Special Rapporteur proposed that the Drafting Committee should be entrusted to review the wording of draft article 16, taking into account the above suggestions.

88/ The text, as provisionally adopted on first reading by the Commission, read as follows:

"Article 16. Fiscal matters

> Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges."

Article 17. Participation in companies or other collective bodies [89]

202. The Special Rapporteur noted that no substantive objections had been raised with regard to the draft article. It was recalled that one Government had proposed in its written comment that the requirement for the collective body to have its principal place of business in the forum State should be given preference over the other criteria. Another Government had proposed that the words "participation" and "participants" be replaced by "membership" and "members", respectively. The suggestion of the Special Rapporteur was to retain the draft without substantive changes.

203. No substantive comments were made on this article during the Commission's discussion of this topic.

---

[89] The text, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 17. Participation in companies or other collective bodies
>
> 1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:
>
> (a) has participants other than States or international organizations; and
>
> (b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.
>
> 2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question."

Article 18. State-owned or State-operated ships engaged in commercial service [90]

204. The Special Rapporteur pointed out that he had given detailed explanations

---

[90] The text, as provisionally adopted on first reading by the Commission, read as follows:

"Article 18. State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(a) a claim in respect of collision or other accidents of navigation;

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability, which are available to private ships and cargoes and their owners.

on the article in his second report 91/ and was now recommending the deletion of the word "non-governmental" in paragraphs 1 and 4, which in his view rendered their meaning ambiguous and might create a departure from the practice followed in a number of treaties related to the law of the sea. Those treaties were cited in his third report. 92/ As to the suggestion made by some Governments to introduce in the present article the concept of segregated State property relating to State-owned or State-operated ships engaged in commercial service, the Special Rapporteur was inclined to the opinion, shared by some other members, that the Commission should be careful to avoid unnecessary duplication, in particular with article 11 bis. If the ship concerned belonged to a State enterprise, it would be subject, under that article, to the same rules and liabilities as were applicable to natural or juridical persons. As to the question of State-owned or State-operated aircraft engaged in commercial service, the Special Rapporteur had suggested that this question could be more suitably covered in the commentary rather than by an additional provision. 93/

205. During the Commission's discussion of the topic, a number of members supported the recommendation of the Special Rapporteur to delete the word "non-governmental" in paragraphs 1 and 4, one with the proviso that the meaning of the words "for commercial purposes" was made clear in the commentary and that it was explained that, if a ship was engaged in a governmental mission, the immunity of the owner or operator State would revive. Some other members were, however, opposed to the deletion. It was

---

7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo."

91/ A/CN.4/422, para. 24.

92/ A/CN.4/431, footnote 7.

93/ See A/CN.4/422/Add.1 and Corr.1, para. 6.

pointed out by one member that "government non-commercial service" seemed to be the traditional formulation and a precedent was to be found for it, inter alia, in the 1958 Convention on the High Seas. Logically, it was said, the expression "commercial non-governmental" should be the counterpart of "government non-commercial" in paragraphs 2, 5 and 7, and there was no reason why the two terms should not be used simultaneously. In his view, the use of the two qualifying words was justified, because they referred respectively to the nature of the service and to the object pursued by the State in the case in point, it being understood that the criterion of object was paramount in respect of immunity. Some drafting changes were proposed in this connection. Another member stated that the deletion of the word "non-governmental" from paragraphs 1 and 4 would constitute a serious derogation from the principle of the jurisdictional immunity of States and frustrate the efforts of many developing countries to develop national shipping lines as a matter of national policy and not merely for commercial purposes. One other member, while not insisting on the retention of the word "non-governmental", suggested that it should be made clear that, in cases where the public interest was involved in a particular commercial activity carried out by a State ship, the State concerned could invoke the immunity of the ship.

206. Taking those views into account, and also the fact that many other members had favoured the deletion of the word in question at the previous session, the Special Rapporteur suggested that the question be referred to the Drafting Committee.

207. As regards the suggestion of some Governments to introduce the concept of segregated State property in relation to State-owned or State-operated ships engaged in commercial services, one member referred to the reforms which he believed would be carried out in that field in the Soviet Union in the spirit of the new laws on property and enterprise. Another member was concerned that the article as presently formulated failed to take fully into account a system adopted by some States in which State-owned ships were operated for commercial purposes by independent legal entities. According to that member's interpretation, such a system did not fall within the scope of article 11 bis. He maintained that an examination of the relevant conventions cited in the

Special Rapporteur's report revealed that they generally mentioned both the owner and operator State when dealing with ships used in non-commercial government service, but only the operator when they covered ships used strictly for commercial service. He suggested therefore that, since draft article 18 referred only to commercial activities, only State-operated ships should be covered. The Special Rapporteur stated that personally he was not convinced that such an interpretation was consistent, for example, with the 1926 Brussels Convention concerning State-owned Vessels, as pointed out also by one member, but the matter could be considered by the Drafting Committee.

Article 19. Effect of an arbitration agreement [94]

208. With regard to article 19, the Special Rapporteur considered that there were essentially three issues on which the views of members were sought. First, the views were still divided as to the choice between the bracketed terms [commercial contract] and [civil or commercial matter] in the *chapeau* of the article. The Special Rapporteur held the view that there would be little reason to limit the supervisory jurisdiction of a court of a forum State to a "commercial contract" or a "commercial transaction", since the scope of an arbitration depended primarily on the terms of the arbitration agreement and, in fact, there had been a number of arbitration cases arising out of civil or

---

[94] The text, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 19. Effect of an arbitration agreement
>
> If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
>
> (a) the validity or interpretation of the arbitration agreement;
>
> (b) the arbitration procedure;
>
> (c) the setting aside of the award;
>
> unless the arbitration agreement otherwise provides."

commercial matters. The last part of the article, which read "unless the arbitration agreement otherwise provides", indicated that if the parties to the agreement wished to limit the scope of arbitration to differences arising out of a commercial contract, they could do so by inserting a provision to that effect in the arbitration agreement.

209. The second point had to do with the wording of subparagraph (c), to which one Government had proposed adding "recognition and enforcement" of the arbitral award. However, since the question of "measures of constraint", which included "enforcement", was to be treated in Part IV of the present draft articles, the Special Rapporteur had suggested simply the addition of a new subparagraph (d) reading "the recognition of the award", 95/ on the understanding that the term "recognition" should be interpreted as the act which entailed "turning the award into a judgement or a title equivalent to a judgement by providing it with an exequatur or some similar judicial certificate", but not as waiver of immunity from execution. If, on the other hand, recognition was interpreted as a first step towards execution, he stated his proposal might have to be reconsidered.

210. The third point was that, while the Commission had considered on first reading two alternatives for the last part of the chapeau, namely, "a court of another State which is otherwise competent", or "a court of another State in the territory or according to the law of which the arbitration has taken or will take place", and had chosen the former, the Special Rapporteur was of the opinion that the latter formula, which was that adopted in article 12 of the European Convention on State Immunity, might have some merits as far as arbitration procedure was concerned. He therefore recommended that members discuss this point further.

211. On the first question - the choice between the expression "commercial contract" and "civil or commercial matter" - the views of members seemed to be divided, as at the previous session. One member proposed a third formulation along the lines of "commercial or accessory or assimilated matters" to cover, for instance, disputes that might arise in connection with the salvage of

---

95/ A/CN.422/Add.1 and Corr.1, paras. 13-15.

commercial ships. As to the second question - adding a new subparagraph (d) concerning the recognition of the award - a few members spoke in favour of such an addition, while several others opposed it on the ground that recognition of the award could be deemed to constitute a first step towards execution of the award, which required the express consent of the State concerned. The view was also expressed that the recognition procedure, which appeared to be specific to certain legal systems, did not fall directly within the purview of that part of the topic but would rather concern the part relating to enforcement; it was suggested that the proposed addition should be considered in the context of Part IV of the draft articles. One member expressed concern about the tendency to confuse an agreement on arbitration with a waiver of immunity. A suggestion was made, therefore, to include a provision in article 19 to the effect that submission to arbitration should not be construed as submission to the jurisdiction of the forum State. Similarly, it was suggested that a State party to an arbitration agreement must retain its right to invoke immunity before the courts of a State that was not involved or designated by the agreement, unless the agreement contained an explicit provision to the contrary.

212. With regard to the third question - the replacement of the phrase in the chapeau "a court of another State which is otherwise competent" with "a court of another State in the territory or according to the law of which the arbitration has taken or will take place" - one member preferred the former wording, whereas two other members supported the latter.

213. In the light of these comments, the Special Rapporteur recommended that the choice between "commercial contract" and "civil or commercial matter" be referred to the Drafting Committee. As to the addition of a new subparagraph (d) concerning the recognition of the arbitral award, he was of the view that, if recognition of the award was indeed interpreted under many domestic civil law procedures as the first step towards its execution, it would be best not to include it in subparagraph (d). Noting the highly technical nature of the legal question, he suggested that the matter be examined further by the Drafting Committee.

14

Article 20. Cases of nationalization [96]

214. The Special Rapporteur recalled that the article had emerged during the first reading as a general reservation clause. According to some members, measures of nationalization, as sovereign acts, were not subject to jurisdiction before the court of another State. A number of members, however, had commented that the meaning and the proper scope of the article were unclear; some members had also suggested that it be placed in Part I. The view of the Special Rapporteur was that the territorial effects of nationalization was not a subject on which the Commission was expected to express an opinion. Considering that and also the fact that many members were in favour of deleting the article, the Special Rapporteur recommended its deletion.

215. All members who expressed their views on the article agreed that the article should be deleted. It was suggested that the question of nationalization was far too complex to be dealt with in an article. It was also stated that measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and could not be considered as representing an exception to the principle of State immunity.

2. Part IV. State immunities in respect of property from measures of constraint

216. As regards the title of Part IV of the draft articles, one member suggested that it might be altered to read "Jurisdictional immunities of States in respect of their property", which would be clearer and much closer to the title of the topic than "measures of constraint" in the present title. The latter, in his opinion, did not clearly indicate whether or not it covered execution, which went well beyond measures of constraint.

---

[96] The text, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 20. Cases of nationalization
>
> The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual."

Article 21. State immunity from measures of constraint,
Article 22. Consent to measures of constraint and
Article 23. Specific categories of property [97]

---

[97] The texts, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 21. State immunity from measures of constraint
>
> A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measures of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:
>
> (a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or
>
> (b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.
>
> "Article 22. Consent to measures of constraint
>
> 1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:
>
> (a) by international agreement;
>
> (b) in a written contract; or
>
> (c) by a declaration before the court in a specified case.
>
> 2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which a separate consent shall be necessary.
>
> "Article 23. Specific categories of property
>
> 1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under paragraph (a) of article 21:

217. The Special Rapporteur referred to his commentary to articles 21 to 23, 98/ in which he had pointed out that, owing to the independent development of the subject of immunity from measures of constraint and that of immunity from jurisdiction, there was still a division of opinion on the subject of immunity from measures of constraint, even among the industrialized countries which were inclined towards restrictive immunity. According to one view, the power to proceed to measures of constraint was regarded as the consequence of the power to exercise jurisdiction, but the opposing view held that international law prohibited forced execution on the property of a foreign State situated in a forum State even where a court of the forum State had jurisdiction to adjudicate over the dispute. The former view was held by the courts of Switzerland, the Netherlands and the Federal Republic of Germany, while a number of socialist Governments were inclined to the latter

---

(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of paragraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22."

98/ A/CN.4/431 and Corr.1, p. 38, para. 1.

view. However, the recent tendency among industrialized countries was to restrict State immunity in respect of property from measures of constraint. Examples of that trend could be cited in recent legislation in the United Kingdom, South Africa, Singapore, Pakistan and Australia. Under that system, provision was made for the enforcement of a judgement or an arbitral award in respect of State property which was for the time being in use, or was intended to be used, for commercial purposes. Recent legislation in the United States, while setting forth the general rule of immunity from execution, provided for a number of exceptions to the effect that property used for a commercial activity in the United States was subject to execution although the basic rule underlying it was the general prohibition of enforcement measures subject to the possibility of express waiver; the European Convention on State Immunity provided for the direct obligation of contracting States to abide by a judgement rendered against them. In case of non-compliance, the plaintiff could institute proceedings before the court of the State against which the judgement had been rendered, and there was the further possibility of bringing an action before the European Special Tribunal. Still another possibility was the procedure of optional declaration, according to which judgements in cases arising from industrial or commercial activities could be enforced against the property of a debtor State that was used exclusively for such activities. The Special Rapporteur was inclined to the view, however, that the system adopted in the Convention was based on a special confidence between the European countries and that the procedure established in the European Convention was too complex to serve as a guide for the Commission.

218. With this background in mind, the Special Rapporteur suggested that the Commission proceed with the further consideration of the draft article based on two alternatives. The first would be the text as adopted on first reading with certain modifications and the second would be a reformulation of the first alternative, but without the idea of total prohibition of execution. The second alternative was based on the view of the Special Rapporteur that, in the light of the written comments received so far, as well as observations made in the Sixth Committee of the General Assembly and in the Commission, carefully limited execution rather than its total prohibition, would have a better chance of obtaining general approval.

219. As to the first alternative, the bracketed phrase in the opening paragraph of article 21 and in paragraph 1 of article 22 which read "or property in which it has a legally protected interest" would be deleted. The phrase "and has a connection with the object of the claim or with the agency or instrumentality against which the proceeding was directed" in article 21, subparagraph (a), would also be cut out. Third, he was suggesting deletion of the word "non-governmental" in article 21, subparagraph (a), and in the *chapeau* of article 23, paragraph 1. In addition, it would be useful to add the words "and used for monetary purpose" at the end of article 23, paragraph 1 (c).

220. The second alternative for articles 21 to 23 took into account the suggestion that the original articles 21 and 22 should be merged. [99] Paragraph 1 of new article 21 stated the principle of non-execution against

---

[99] The text of the second alternative submitted by the Special Rapporteur read as follows:

"*Article 21*. *State immunity from measures of constraint*

1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a foreign State may be taken in the territory of a forum State unless and to the extent that:

(a) the foreign State has expressly consented to the taking of such measures in respect of that property, as indicated:

(i) by arbitration agreement;

(ii) by international agreement or in a written contract;

(iii) by a written consent given after a dispute between the parties has arisen; or

(b) the foreign State has allocated or earmarked its property for the satisfaction of the claim which is the object of that proceeding; or

(c) the property is in the territory of the forum State and is specifically in use or intended for use by the State for commercial [non-governmental] purposes [and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed].

the property of a foreign State in the territory of a forum State, a statement that was followed by a number of exceptions set out in subparagraphs (a)

---

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which separate consent shall be necessary.

"Article 22 (originally article 23). Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial purposes under paragraph 1 (c) of article 21:

(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the foreign State which is in the territory of a forum State and used for monetary purposes;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of a forum State unless the State in question has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under paragraph 1 (a) of article 21, or allocated or earmarked that property within the meaning of paragraph 1 (b) of the same article.

"Article 23

If State property including a segregated State property is entrusted by the State to a State enterprise for commercial purposes, the State cannot invoke immunity from a measure of a constraint before the court of a forum State in respect of that State property."

to (c), which were by and large the same as those contained in paragraph 1 of former article 22 as well as those listed in article 21 of the text adopted on first reading. The Special Rapporteur, however, suggested three major changes to the texts of those exceptions as adopted on first reading. First, a reference to arbitration agreements had been introduced in paragraph 1, subparagraph (a) (i). Second, a drafting change had been made in paragraph 1, subparagraph (a) (iii) for the same reason as the similar change in article 8, paragraph 1 (c). Third, the words "the property is in the territory of the forum State" had been added at the beginning of paragraph 1 (c). Article 22 basically reproduced the original version of article 23. Article 23 in the second alternative was a new article. Article 11 bis had already provided that a State enterprise was subject to the same rules and liabilities as were applicable to a national or juridical person. Accordingly, in respect of measures of constraint, a State enterprise was subject to the same rules and liabilities as a natural or juridical person. Logically, therefore, the State could not invoke immunity from measures of constraint before the court of the forum State in respect of such State property as the State had entrusted to a State enterprise.

221. The two alternative sets of articles 21 to 23 proposed by the Special Rapporteur drew comments from many members. Some members reiterated their position that the articles should clearly set forth the principle of immunity from measures of constraint, followed by limited exceptions to the rule. It was said that measures of constraint would strain relations between States; the recent tendency in some developed countries to restrict State immunity from execution was a dangerous departure from the rules of sovereign immunity of States and should be curbed rather than encouraged by the Commission. In this connection, one member referred to the proposed reformulation of article 21 that he had proposed at the previous session, 100/ though he would further study the Special Rapporteur's recommendation for the article.

100/ Official Records of the General Assembly, Supplement No. 10 (A/44/10), Chapter VI, para. 578.

222. Notwithstanding these reservations, the Commission's discussion of the two alternative articles indicated general support for the approach adopted by the Special Rapporteur in the second alternative, including the idea of merging articles 21 and 22.

223. The views of members on the substance of new article 21 were, however, divided, in particular on two points. The first related to the proposed deletion of the phrase "property in which it has a legally protected interest" which appeared in the original text of the *chapeau* of article 21 and of paragraph 1 of article 22. Some members supported the proposal which had the effect of focusing on "property of a foreign State" as the sole object deserving protection. It was said that it would be absurd to grant to third parties complete protection from measures of constraint simply because a foreign State had an interest in the property concerned, although, as a safeguard, a provision could perhaps be added to the effect that any rights enjoyed by a foreign State in relation to property owned by a third party could not be affected by measures of constraint against that third party. To some other members, the deletion of the phrase was not acceptable as it would broaden the scope of the exceptions to the immunity of States from foreign enforcement jurisdiction. It was also held that the concept of "interest" was distinct from that of "property", as the Commission had itself recognized in the draft of the 1983 Convention on Succession of States in respect of State Property, Archives and Debts. In the commentary to its article 5 (which had later become article 8), the Commission had stressed that the expression "property, rights and interests" referred to "rights and interests of a legal nature". 101/ The deletion of the concept of "interest", it was said, would therefore leave a gap that would be difficult to fill.

224. The second point on which the views of members were divided concerned the deletion of the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in paragraph 1 (c) of new article 21. Most speakers argued that the phrase was of crucial importance and should be retained. Otherwise, it was said,

---

101/ *Yearbook ... 1981*, vol. II (Part Two), para. 10.

measures of constraint might be taken against any property of a foreign State, if it was used for commercial purposes: in particular, the phrase would avoid confusion between State property, on the one hand, and property of other agencies and property of public enterprises, on the other hand. Some members, however, endorsed the deletion, for it was often hard, if not impossible, in practice to establish a link between the claim and the property against which execution was sought, especially where financial claims were concerned.

225. In this connection, one member referred to the United States legislation which followed a two-track approach on the question of linkage, treating the property of State agencies and instrumentalities differently from other State property. He suggested that the Commission might want to consider introducing some of the distinctions contained in United States or other legislation with respect to State property. In any event, he was not sure what was meant by the language of the original text of subparagraph (a) of article 21: "has a connection ... with the agency or instrumentality against which the proceeding was directed".

226. The deletion of the word "non-governmental" from paragraph 1 (c) of new article 21 which was proposed by the Special Rapporteur, was specifically commented upon by two members, one in favour of its retention and the other for its deletion.

227. With regard to new article 22 proposed by the Special Rapporteur, many speakers supported the addition of the words "and used for monetary purpose" to paragraph 1 (c), although one member opposed the addition of such words because of the way they could be interpreted by local courts. Another member endorsed the view that there was an organic link between that article and article 11 *bis* which should be duly taken into account. The same member, however, stressed the importance of the concept behind subparagraph (c) that property of the central bank of the foreign State which was in the territory of the forum State was unconditionally exempted from measures of constraint whatever the purpose for which it was used; the central banks were instruments of the sovereign power and all activities conducted by them enjoyed immunity from measures of constraint; what was more, central banks should, because of their legal status, be considered as State bodies and automatically enjoy immunity on that basis. He further suggested that the Drafting Committee

consider how the wording of paragraph 2 could be improved to ensure protection of the specific categories of property in question against all measures of constraint or, in other words, allow no derogations from the principle of immunity in respect of that property.

228. New article 23 proposed by the Special Rapporteur was considered justified by one member as a corollary to draft article 11 bis. Another member, however, did not agree with the concept of "segregated State property" and did not think that anything would be lost by deleting it from the article. Yet another member proposed an alternative formulation which would read:

> "A State cannot invoke immunity from measures of constraint, including measures of attachment, arrest and execution in respect of the property of a State enterprise."

The majority of members were, however, of the view that new article 23 was probably unnecessary, but that the Commission should await the final results of its work concerning the definition of "State" in article 2 and the ultimate fate of article 11 bis. It was held that a State enterprise established for commercial purposes, not being a State as defined in article 2, was not entitled to perform acts pursuant to the governmental authority of the State; hence it fell outside the scope of the topic of jurisdictional immunities of States and article 23 should therefore be deleted.

3. Part V. Miscellaneous provisions

Article 24. Service of process 102/

229. In the light of written comments submitted by Governments, the Special Rapporteur suggested changing the procedure for the service of process under paragraph 1 to either that agreed in an international convention or transmission

---

102/ The text, as provisionally adopted on first reading by the Commission, read as follows:

"Article 24. Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any special arrangement for service between the claimant and the State concerned; or through diplomatic channels. In the case of the existence of a convention binding upon both the forum State and the other State concerned, the service of process under the convention should have priority. The amended subparagraphs (a) and (b) of paragraph 1, would then read:

> "(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
>
> (b) failing such a convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned."

230. With regard to paragraph 3, the Special Rapporteur pointed out that several members had commented at the previous session that the phrase "if necessary" should be deleted. Because of the practical problems that would be encountered by the authority serving the process if those words were deleted, the Special Rapporteur suggested the addition of the phrase "or at least by a

---

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(d) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by another other means.

2. Service of process by the means referred to in paragraphs 1 (c) and (d) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3."

translation into one of the official languages of the United Nations" so that, in cases where translation into a language which was not widely used might give rise to difficulties on the part of the authority serving the process, a translation into one of the official languages of the United Nations should be accepted.

231. Most of the members who spoke on the article expressed support for the proposed changes. One member still felt, however, that the revised text did not adequately take cognizance of the fact that every State had its own rules as to service of process and would not be willing to modify its domestic rules of civil procedure if a national ratification of, or accession to, an international convention so required. Accordingly, he proposed the inclusion of a new subparagraph (a) of paragraph 1, reading: "in accordance with the rules of civil procedure of the State of forum". Without such a clause, he would find it difficult to accept paragraph 4 of the article, which, in its present formulation, denied the State concerned the right to seek annulment of the proceeding on the ground that it was not duly impleaded. Some members commented on paragraph 3 concerning translation of documents. One member did not favour the changes suggested by the Special Rapporteur, which, in his view, did not adequately safeguard the interests of the State concerned; another suggested that if the parties explicitly agreed on the proper law of the contract, the specific language of the legal order concerned should be deemed sufficient. While welcoming the suggestion about translation into one of the official languages of the United Nations, that member stressed the need for a reasonable link between the official language used and the proceeding. In this context, two alternative formulations were proposed by other members. The first alternative formulation would read: "The document should be made available in a language acceptable to the State concerned" which, it was suggested, should also be introduced in article 25, paragraph 2; another formulation would read: "These documents shall be accompanied by a translation into the official language or one of the official languages of the State concerned, or at least by a translation into one of the official languages of the United Nations in use in that State".

Article 25. Default judgement [103]

232. The Special Rapporteur, referring to the suggestion made by one Government in its written comments that it should be made clear that the default judgement should not be rendered merely by virtue of due service of process (a suggestion which had been supported by a member of the Commission at the previous session), proposed the addition at the end of paragraph 1 of a phrase which would read: "and if the court had jurisdiction in accordance with the present articles". The Special Rapporteur also noted the suggestion of some members of the Commission to delete the words "if necessary" from paragraph 2, as in the case of paragraph 3 of article 24. His view was that the same solution should be adopted for both articles 24 and 25.

233. The proposed addition of the words "and if the court had jurisdiction in accordance with the present articles" at the end of article 25, paragraph 1, commanded general support. One member drew attention to the fact that in a number of cases, default judgement had been rendered against a foreign State simply because that State had failed to enter an appearance before the court in order to invoke immunity. The rule of sovereign immunity had not shielded them from such a judgement because, under the procedural laws of the countries concerned, a defendant had to appear in court and expressly plead lack of

---

[103] The text, as provisionally adopted on first reading by the Commission, read as follows:

"Article 25. Default judgement

1. No default judgement shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgement set aside, which shall be not less than three months from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned, shall begin to run from that date."

jurisdiction. With a view to affording States better protection, that member suggested adding a separate paragraph to the effect that it was incumbent upon the judge to inquire ex officio into the issue of immunity under the draft articles. The suggestion was supported by several other members, one of whom futher suggested that, in view of its general nature, the proposed separate paragraph should be inserted in article 6 (original article 7). In that connection, the Special Rapporteur recalled that another member had likewise proposed the insertion of a new paragraph, reading "The court must ex officio determine that relevant provision had been complied with prior to rendering judgement", either in article 25 or in the commentary. The view of the Special Rapporteur was that the Drafting Committee should consider those suggestions in conjunction with article 6.

234. As regards the provisions of article 25 in general, one member stated that he could endorse the article, subject to the adoption of the new subparagraph (a) which he had suggested for inclusion in paragraph 1 of article 24. 104/

Article 26. Immunity from measures of coercion 105/

235. The Special Rapporteur had no further suggestion to make with regard to the article. It was recalled that two Governments in their written comments had expressed doubts as to the appropriateness of the provision. However, one other Government, while endorsing the objective of the provision, had suggested its reformulation to the effect that the possibility of issuing such an order itself should be prevented. The Special Rapporteur stated that he preferred to keep the original formulation, pending the expression of views by more members.

104/ See paragraph 231 above.

105/ The text, as provisionally adopted on first reading by [illegible] Commission, read as follows:

> "Article 26. Immunity from measures of coercion
>
> A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty."

236. Some members considered that the article needed clarification about its objective. One member referred to two possible interpretations of the article, one being that it prohibited domestic courts from issuing any order or injunction against a foreign State with the threat of monetary penalty, and the other that it would prohibit only the imposition of a monetary penalty on a foreign State. Another member held that article 26 in its present form would allow only the latter interpretation. Yet another member suggested a new text in order to accommodate the comments of a Government referred to by the Special Rapporteur, which would read:

> "where a State enjoys immunity in a proceeding before a court of another State, the court cannot issue any order against the State requiring it to perform or to refrain from performing a specific act."

In the view of the Special Rapporteur, the foregoing comments could be taken into account by the Drafting Committee, which might also consider the possibility of recommending the deletion of the article.

Article 27. Procedural immunities 106/

237. The Special Rapporteur noted that in his second report he had proposed inserting the words "which is a defendant in a proceeding before a court of another State" in paragraph 2, a proposal that had received support both in the Commission at its previous session and in the Sixth Committee of the General Assembly.

106/ The text, as provisionally adopted on first reading by the Commission, read as follows:

> "Article 27. Procedural immunities
>
> 1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.
>
> 2. A State is not required to provide any security, bond or deposit however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State."

238. Members' views differed about the proposed addition. A number of members were in favour of the addition, one on the understanding that it was the plaintiff State that decided to bring a case before the courts and that could thus be said to submit, unlike the defendant State, to the same rules as those applying to any other plaintiff. Some other members were however opposed to the addition, holding the view that non-requirement of security should not be limited to defendant States alone. The Special Rapporteur noted that the matter involved legal technicalities and should be referred to the Drafting Committee.

Article 28. Non-discrimination 107/

239. The Special Rapporteur noted that the views of members on this article were divided as to whether or not this article should be retained. His suggestion was to retain the article in its present form for the time being, as this subject would require careful consideration after general agreement was reached on the preceding articles.

240. With the exception of two members, all members who spoke on the article proposed its deletion. In this connection, one member stated that the provision would encourage a restrictive application of the draft articles, contrary to the very purpose of codification; moreover, it might be superfluous, since the opening clause of many articles reading "Unless otherwise agreed between the States concerned" already permitted limitations

---

107/ The text, as provisionally adopted on first reading by the Commission, read as follows:

"Article 28. Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States parties thereto.

2. However, discrimination shall not be regarded as taking place:

(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles."

or extensions of immunity by way of agreement or reciprocity. Noting that article 28 was modelled on article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations, another member remarked that, while there might be a justification for such a provision to appear in those conventions, he doubted whether it needed to be included in the draft, since neither the object of immunity nor the basis of immunity was the same.

241. The Special Rapporteur suggested that the article be retained in its present form for the time being, since the subject would require careful consideration after general agreement was reached on the preceding articles.

4. Settlement of disputes 108/

242. On the question of the settlement of disputes, one member expressed the view that it should be the subject of an optional protocol and should, in any event, be dealt with at a diplomatic conference.

243. In view of the advanced stage of the work on this topic, the Commission did not find it necessary to indicate specific issues on which expressions of views by Governments would be of particular interest (paragraph 4 (c) of General Assembly resolution 44/35).

108/ Articles 29 to 33 and the Annex dealing with the settlement of disputes, which were proposed by the former Special Rapporteur but not discussed, are reproduced in the Report of the Commission on the work of its forty-first session (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10), para. 611).

CHAPTER IV

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction [109]

244. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970.

245. The work begun by the three previous Special Rapporteurs was continued by Mr. Stephen C. McCaffrey, who was appointed by the Commission as Special Rapporteur on the topic at its thirty-seventh session in 1985.

246. At that session, [110] the Special Rapporteur submitted a preliminary report which reviewed the Commission's work on the topic to date and indicated his preliminary views as to the general lines along which the Commission's work on the topic could proceed. There was general agreement with the Special Rapporteur's proposal that he follow generally the outline proposed by the previous Special Rapporteurs in elaborating further draft articles on the topic.

247. Between the thirty-eighth (1986) session and forty-first (1989) session, the Special Rapporteur submitted to the Commission four additional reports on the topic. [111]

---

[109] For a fuller statement of the historical background as well as a more detailed account of the Commission's work on the topic, see *Yearbook ... 1985*, vol. II (Part Two), pp. 68-71, document A/40/10, paras. 268-278 and Report of the International Law Commission on the work of its forty-first session, (*Official Records of the General Assembly, Forty-fourth session, Supplement No. 10* (A/44/10)), paras. 621-636.

[110] *Yearbook ... 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

[111] The Commission received the Special Rapporteur's second report (A/CN.4/399 and Add.1 and 2) at its thirty-eighth session, his third report (A/CN.4/406 and Corr.1, A/CN.4/406/Add.1 and Corr.1 and A/CN.4/406/Add.2 and Corr.1) at its thirty-ninth session, his fourth report (A/CN.4/412, A/CN.4/412/Add.1 and Corr.1 and A/CN.4/412/Add.2 and Corr.1-3) at its fortieth session and his fifth report (A/CN.4/421 and Corr.1-4 and A/CN.4/421 and Add.1 and 2) at its forty-first session.

248. At its thirty-ninth session, the Commission approved the recommendation of the Drafting Committee with regard to article 1 and the question of the term "system" [112] and provisionally adopted articles 2 to 7. [113] At its fortieth session, the Commission provisionally adopted articles 8 to 21. [114]

249. At the forty-first session of the Commission, the Special Rapporteur reaffirmed the schedule for submission of the remaining material which he proposed in 1988, [115] and which was intended to place the Commission in a position to conclude the first reading of the complete set of draft articles by the end of its current term of office in 1991.

250. At the same session, articles 22 and 23 [116] contained in the first part of the fifth report [117] were referred to the Drafting Committee after discussion in the Commission.

---

[112] Specifically, the Commission agreed to set aside for the time being the question of article 1 "Use of terms" and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis (adopted by the Commission at its thirty-second session and set forth in footnote 128 *infra*). Thus, the word "system" appears in square brackets throughout the text, see Report of the International Law Commission on the work of its thirty-ninth session, *Official Records of the General Assembly, Forty-second session, Supplement No. 10* (A/42/10), para. 117.

[113] For the text of these draft articles, see Section C below. For the commentaries thereto see *ibid*.

[114] For the text of those draft articles, see Section C below. For the commentaries thereto see *ibid*., *Forty-third session, Supplement No. 10* (A/43/10), para. 190.

[115] See document A/CN.4/412, para. 8.

[116] In order to avoid confusion, it should be mentioned that after the submission by the Special Rapporteur of his articles 22 to 28 contained in the first part of his fifth report and in his sixth report, the Commission adopted on the basis of previously submitted draft articles, six articles for inclusion after article 21 and, accordingly numbered 22 to 27. As a result, two different sets of articles are designated in the present report by the same numbers.

[117] For the text of articles 22 and 23, see Report of the International Law Commission on the work of its forty-first session, *Official Records of the General Assembly, Forty-fourth session, Supplement No. 10* (A/44/10), paras. 637 and 641 respectively.

B. Consideration of the topic at the present session

251. At the present session, the Commission had before it the second part of the fifth report (A/CN.4/421/Add.2) and the sixth report (A/CN.4/427 and Corr.1 and A/CN.4/427/Add.1) of the Special Rapporteur.

252. In the second part of the fifth report, which had been introduced at the previous session, [118] the Special Rapporteur submitted two articles: article 24, "Relationship between navigation and non-navigational uses; absence of priority among uses" and article 25, "Regulation of international watercourses" which would constitute Part V and Part VI of the draft articles respectively. [119]

253. The first part of the sixth report contained chapters on management of international watercourses, security of hydraulic installations and implementation of the draft articles. It included three new articles: article 26, "Joint institutional management"; article 27, "Protection of water resources and installations"; and article 28, "Status of international watercourses and water installations in time of armed conflict". Also included was annex I to the draft articles entitled "Implementation of the draft articles". The annex consisted of eight articles respectively entitled "Definition", "Non-discrimination", "Recourse under domestic law", "Equal right of access", "Provision of information", "Jurisdictional immunity", "Conference of the Parties" and "Amendments to the draft articles". As for the second part of the sixth report, which contained a chapter on settlement of disputes, it was introduced at the present session but was not discussed for lack of time.

---

[118] A summary of the Special Rapporteur's presentation of the second part of his fifth report is to be found in last year's report of the Commission, (*Ibid*., paras. 678-683).

[119] For the text of articles 24 and 25, as proposed by the Special Rapporteur, see *ibid*., para. 677.

254. The Commission considered the above-mentioned reports at its 2162nd to 2167th and 2188th meetings. At the 2167th meeting, on the recommendation of the Special Rapporteur, it referred articles 24, 25, 26, 27 and 28, together with article 3, paragraph 1 and article 4 of annex I to the Drafting Committee. At its 2187th and 2188th meetings, the Commission, after examining the report of the Drafting Committee, adopted provisionally the following articles: articles 22 (Protection and preservation of ecosystems), 23 (Prevention, reduction and control of pollution), 24 (Introduction of alien or new species) and 25 (Protection and preservation of the marine environment), comprising Part IV of the draft, entitled "Protection and preservation", as well as article 26 (Prevention and mitigation of harmful conditions) and 27 (Emergency situations) comprising Part V of the draft, entitled "Harmful conditions and emergency situations". The text of the articles and the commentaries thereto appear in Section C.2 below.

1. General comments

255. Some members commented on the merits of the framework agreement approach and on the meaning of the term "framework agreement".

256. Members of the Commission who spoke on the first point generally agreed with the framework character of the draft, in accordance with the decision taken by the Commission long ago.

257. On the meaning of the term "framework agreement", there was no disagreement with the view that a framework agreement was an instrument of a general nature which set forth principles and other general rules. The remark was however made that a framework agreement could reflect rules of customary international law and went in any event beyond a mere recommendation.

258. In his summing up the Special Rapporteur assured the Commission that in proposing draft articles, it had always been his intention to remain within the framework agreement approach.

2. Comments on specific draft articles

Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses [120]

259. Both this article and article 25 were orally introduced by the Special Rapporteur at the previous session. A summary of his introduction may be found in the Commission's report on the work of that session. [121]

260. There was general agreement that article 24 was well balanced and reflected the fact that any priority that was once assigned to navigation was no longer justified in view of the many other uses of international watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources.

261. Some members doubted whether there had ever existed a universal preferential régime deriving from the treaties cited in the Special Rapporteur's fifth report.

262. General support was expressed for the underlying principle of article 24 that, in the absence of agreement to the contrary, no one use should have priority over other uses. It was, however, stressed on the one hand that the

---

[120] The text of draft article 24 as proposed by the Special Rapporteur read as follows:

"PART V

RELATIONSHIP TO NAVIGATIONAL USES AND ABSENCE OF PRIORITY AMONG USES

"Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses

1. In the absence of agreement to the contrary, neither navigation nor any other use enjoys an inherent priority over other uses.

2. In the event that uses of an international watercourse [system] conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof in accordance with articles 6 and 7 of these draft articles."

[121] *Official Records of the General Assembly, Forty-fourth session, Supplement No. 10* (A/44/10), paras. 678-682.

importance and significance of navigation for some watercourse States could not be underestimated and, on the other hand, that since the enormous growth in importance of alternative means of communications had relegated navigation on inland watercourses to a very secondary role, except in rare instances, and in view of the scarcity of water, domestic and agricultural utilization would have to be given priority over other uses. In connection with the latter consideration, the remark was made that article 24 reflected the present position, but failed to look sufficiently to the problems of the future. It was also said that greater weight should be given to certain factors, such as the health of the population and maintaining suitable water quality for domestic and agricultural uses, as well as the adverse effect of certain uses on the environment.

263. With regard to the wording of paragraph 1, several members asked why the Special Rapporteur simply referred to "use", while article VI of the Helsinki rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966, referred to a "use or category of uses".

264. Paragraph 2 was generally supported as allowing for an equitable and reasonable resolution of any conflict between uses by weighing uses against one other in accordance with articles 6 and 7. Some members, however, favoured the inclusion therein of a reference to the obligation not to cause appreciable harm set forth in article 8.

265. One member, while agreeing with the principle enunciated in paragraph 1, felt that the provision in paragraph 2 went beyond the scope of the draft and, indeed, beyond that of the Commission's competence. In his view, there was no point in the article as a whole other than an obvious one, namely that States themselves determined their uses of watercourses, taking into account the interests of optimum utilization and relevant factors, not least their own geographical situations with respect to the watercourse.

266. In summing up, the Special Rapporteur explained that he had attempted in article 24 to strike a fair balance between the various considerations at issue and that it appeared from the debate that he had succeeded in so doing. He added that the constructive drafting observations which had been made during the debate would be duly taken into consideration.

Article 25. Regulation of international watercourses [122]

267. The article received broad support on the ground that regulation was essential or even vital for the manifold uses made of watercourses today. It was suggested that the term "regulation" should be defined either in article 1 (Use of terms) or in the article itself.

268. Two members believed, however, that the article was unnecessary since a general obligation of co-operation to "attain optimum utilization and adequate protection of an international watercourse" was already laid down in article 9. The question was further asked why the application of the concept of equitable cost-sharing should be limited to the field of regulation.

269. As regards paragraph 1, the approach reflected therein, whereby regulation was not an obligation for watercourse States, was viewed as correct because a watercourse State had a right to regulate the part of an international watercourse within its territory. Thus, it was observed, paragraph 1 was a concrete application of article 9, and co-operation under article 25 should therefore be based on general principles of international law such as sovereign equality and territorial integrity.

270. Another view was that the obligation to co-operate should be cast in less mandatory terms because watercourse States might have different priorities with regard to the regulation of a watercourse. It was also pointed out that

---

[122] The text of article 25 as proposed by the Special Rapporteur read as follows:

"PART VI

REGULATION OF INTERNATIONAL WATERCOURSES

"Article 25. Regulation of international watercourses

> 1. Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses.
>
> 2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly."

co-operation could be effected either directly or through regional or international organizations as well. It was further pointed out that in an instrument intended for world-wide use it was important that modalities for co-operation should be flexible so as to allow the discharge of the duty to co-operate in cases when political realities did not favour direct co-operation.

271. As for paragraph 2 the residual rule contained therein was viewed as superfluous since it was inconceivable that a watercourse agreement on regulation works would neglect to provide for a sharing of the burdens. Besides, the general rule of participation on an equitable basis had already been set out in article 6. Support was, on the other hand, expressed for the underlying idea of the paragraph, which, it was remarked, should also include some of the more important provisions of the articles on the Regulation of the Flow of Water of International Watercourses adopted by the International Law Association at Belgrade in 1980, particularly the substance of articles 4 and 6 thereof, inasmuch as such provisions might be helpful in resolving conflicts arising from the regulation of international watercourses. Emphasis was also placed on article 3 of that Regulation from which the Commission could draw inspiration to establish a link between paragraphs 1 and 2 of the draft article.

272. Some remarks were made on the drafting of paragraph 2 including the observation that the present wording could be construed to mean that, even in the absence of an agreement, watercourse States would be expected to pay towards a project simply because they happened to derive benefits from it. It was also suggested that the expression "In the absence of agreement to the contrary", was unsatisfactory since even when there was agreement, its objective was the equitable sharing of the burdens and the benefits.

273. One member postulated that the Commission should confine itself to preventing the unfavourable consequences of unilateral regulation. For that purpose it would be useful first to specify that each watercourse State could regulate an international watercourse, provided that such regulation had no negative or harmful effects for any other watercourse State. Secondly he proposed that the States concerned be urged to co-operate in exploring

possibilities of regulation that would be profitable to all. Finally, in his view, it would be useful to enunciate the principle of equitable distribution of the burdens that might arise from joint regulation.

274. In summing up, the Special Rapporteur agreed with the suggestion that the term "regulation" should be defined and recalled in this connection the possible definition contained in paragraph 3 of his comments to the draft article. He took note of the doubts expressed by some members on the wording of paragraph 2. Referring specifically to the question whether watercourse States could be required to participate in a regulation work, he stated that the phrase "watercourse States shall participate on an equitable basis", which was drawn from article 6, was intended to convey the idea that participation would be proportional to the benefits received.

Article [26]. Joint institutional management 123/

275. In his oral introduction of the article, the Special Rapporteur stated that while article 26 on joint institutional management might be viewed as going beyond the realm of a "framework instrument", the needs of the world's

---

123/ The text of article [26] as proposed by the Special Rapporteur read as follows:

"[PART VIII. MANAGEMENT OF INTERNATIONAL WATERCOURSES]

"Article [26]. Joint institutional management

1. Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of a joint organization for the management of an international watercourse [system].

2. For the purposes of the present draft article, the term "management" includes, but is not limited to, the following functions:

(a) Implementation of the obligations of the watercourse States under the present draft articles, in particular the obligations under parts II and III of the draft articles;

(b) Facilitation of regular communication, and exchange of data and information;

(c) Monitoring international watercourse[s] [systems] on a continuous basis;

expanding population for fresh water resources made such an attitude obsolete. He remarked that since most of the world's major watercourses were international, greater efficiency in water use would depend on increased co-operation among watercourse States in the planning, management and protection of international watercourses. In his view, therefore, the article had a place in the draft, for joint management of international watercourses was an increasingly important form of international co-operation. He recalled that, as noted in paragraph 7 of his report, the trend emerging from the extensive work done by international organizations on watercourse management was that, while there was no obligation under general international law to form joint management institutions, management through such institutions was not only an increasingly common phenomenon but was also almost indispensible to optimum utilization and protection of international watercourse[s] [systems]; the international agreements and studies reviewed in section I recognized the need for such institutions, not only to resolve issues of utilization but also to undertake affirmative development and protection.

(d) Planning of sustainable, multi-purpose and integrated development of international watercourse[s] [systems];

(e) Proposing and implementing decisions of the watercourse States concerning the utilization and protection of international watercourse[s] [systems]; and

(f) Proposing and operating warning and control systems relating to pollution, other environmental effects of the utilization of international watercourse[s] [systems], emergency situations, or water-related hazards and dangers.

3. The functions of the joint organization referred to in paragraph 1 may include, in addition to those mentioned in paragraph 2, _inter alia_:

(a) Fact-finding and submission of reports and recommendations in relation to questions referred to the organization by watercourse States; and

(b) Serving as a forum for consultations, negotiations and such other procedures for peaceful settlement as may be established by the watercourse States."

276. Most members viewed the article as a key provision of the draft. It was stressed in this connection that, given the interdependence of the community of States sharing an international watercourse, the need for the rational management and optimum utilization of such a watercourse was self-evident. Such rational management and optimum utilization could be realized only through co-operation among the States concerned - for example, through consultations, regular exchange of data, joint projects, bilateral arrangements and, where deemed appropriate, the establishment of permanent institutional machinery. Some members, however, wondered whether the article was absolutely necessary. The view was expressed in this connection that the obligation contained therein was simply a concrete application of the general obligation to co-operate set forth in article 9. The question was furthermore asked whether that obligation did not involve duplication of the terms of paragraph 3 of article 4 since the establishment of a joint organization would need an agreement to that effect.

277. On the question whether there was a rule of international law involving a duty to consult with a view to establishing a joint body or organization, the view was expressed that while the answer might be in the negative as far as general international law was concerned, there were specific fields of regulation where the establishment of institutional mechanisms was dictated by the logic of the subject matter being regulated and by the interdependence of the States concerned and that such seemed to be the situation in the case under consideration.

278. As regards organizational arrangements, the remark was made that, while there was a need for such arrangements, as suggested by the Special Rapporteur, the shortest way towards that goal lay in adopting recommendations which each State could use in the light of its specific situation, and that it would be premature to raise mechanisms established by virtue of bilateral agreements to the status of binding international rules. A further view was that, given their framework nature, the draft articles should not provide for the establishment of a permanent organization and that it should be left to the parties to future watercourse agreements to define the functions of the body to be set up under those agreements. Such functions

42

would therefore have to be described in article 26 in very general terms or else the list of functions would have to be drawn up as a purely illustrative rather than an exhaustive one.

279. The opinion was also expressed that references to the permanence of the proposed joint organization and to the strengthening of existing organizations envisaged by the previous Special Rapporteur should be reinstated; the terms employed in the article were described as somewhat vague and the suggestion was made that a more firmly worded text along the lines proposed by the previous Special Rapporteur might be preferable.

280. While one member felt that the article should define the possible functions of the organizations and not the concept of management, another suggested that if the Commission decided to retain the article it would be better, instead of trying to illustrate the possible functions of joint organizations, to provide a definition of "management", following, for example, the model of section 2.1 of the Canada Water Act 1969-70 - which would have the additional advantage of introducing the concept of regulation of international watercourses dealt with in article 25.

281. Specific comments on paragraph 1 included the observation that the wording should be more categorical and the remark that, while one could agree with the Special Rapporteur's formulation establishing the duty of a watercourse State to enter into consultations at the request of any other watercourse State, that duty should go further where the economic and social needs of the region were making substantial or conflicting demands on the watercourse and should encompass an obligation to negotiate, which implied the duty to arrive at some result.

282. As for the phrase "at the request of any of them", the view was expressed that it was not very satisfactory and that wording should be found that better reflected the goals being sought. Some members of the Commission were furthermore of the opinion that the obligation of watercourse States to enter into consultations should not be triggered simply by a request of a watercourse State and that there should be an objective element added, such as "when it is deemed practical and advisable".

283. Another observation was that, while the formulation was sufficiently broad to cover very diversified international practice and while it seemed

implicit in the terms of the article that the proposed organization for the management of an international watercourse should comprise all of the States concerned, a new paragraph could be envisaged to stipulate that an international organization should necessarily comprise all of the States of the international watercourse or watercourse system.

284. As for the list of functions, the view was expressed that notwithstanding its non-exhaustive character, it might be useful to include the functions that were of particular importance in third-world countries, and in African countries in particular, such as, for instance, action to combat waterborne diseases.

285. With regard to the place of the article, one member remarked that transferring draft articles 27 and 28 to a more suitable place in the draft would have the welcomed effect of establishing a direct connection between draft article 26 and the subsequent draft articles on implementation. He added that article 26 might, moreover, be combined with the draft articles of annex I into a fully-fledged part on implementation.

286. In summing up, the Special Rapporteur observed that most members viewed the article as an important component of the draft. With reference to the provision relating to consultations, he noted that for some members it was going too far to provide that "watercourse States shall enter into consultations, at the request of any of them ...", while, for others, an obligation to negotiate was more appropriate. He stated that his object had been to formulate paragraph 1 of the article in such a way as to strike a fair balance between a simple recommendation to enter into consultations and an obligation to enter into "negotiations", as had been recommended by the second Special Rapporteur in his third report.

287. In reply to those members who had questioned the value of the article having regard to the number of watercourse commissions that already existed, he pointed out, first, that many of those commissions were very specialized and did not necessarily deal with management of the watercourse concerned as a whole and, secondly, that specialists involved in the day-to-day management of international watercourses who had had occasion to express their views at regional meetings held under United Nations auspices, such as the one recently held in Addis Ababa, had called for the establishment of such bodies.

288. With reference to the proposal that the obligation to consult should be made subject to certain conditions, the Special Rapporteur said that while he would duly consider it, he feared that introducing such conditions could provide a means of escaping even the obligation to enter into consultations - which was already not very stringent - rendering it practically illusory.

289. The Special Rapporteur welcomed the quality of the drafting amendments proposed. In particular, he said that the suggestion to harmonize articles 26 and 21 could perhaps be accomplished by adding a cross-reference in article 26 to article 21.

290. With reference to the different views expressed by members on the term "management" in paragraph 2 the Special Rapporteur stated that he was not opposed to the view that the parties should be free to define management in the particular context. He also agreed with the comment that a list of management functions could only be indicative; he would have no objection to such a list appearing in the annex, as some members had proposed, or to the addition of action to combat waterborne diseases to the list as requested. Finally, he had no objection to replacing the word "organization" by the word "commission".

Articles [27]. Protection of water resources and installations and

Article [28]. Status of international watercourses and water installations in time of armed conflict 124/

291. In his oral introduction of articles 27 and 28, the Special Rapporteur recalled that paragraph 20 of his sixth report listed seven subtopics that might be included in draft articles on security of hydraulic installations.

124/ The texts of articles [27] and [28] proposed by the Special Rapporteur read as follows:

"[PART IX. PROTECTION OF WATER RESOURCES AND INSTALLATIONS]

"Article [27]. Protection of water resources and installations

1. Watercourse States shall employ their best efforts to maintain and protect international watercourses and related installations, facilities and other works.

2. Watercourse States shall enter into consultations, with a view to concluding agreements or arrangements concerning:

While two of his predecessors as Special Rapporteur had expressed some hesitation about how far the Commission should go in that area, they had concluded that a modest article was required on the question of security in times of armed conflict. He had himself reached a similar conclusion and was therefore submitting draft article 28. Article 27 was concerned with safety - a widespread problem - from a more general standpoint. Whenever, for example, a large volume of water was collected behind an unsuitable structure, the downstream State had an obvious interest in the safety standards applied in the construction and maintenance of the structure.

292. The general thrust of article 27 was generally supported on the ground that there was a clear need for protection of water installations. Some members, however, expressed uncertainty as to the scope of the article. Concern was voiced in particular that the inclusion of a reference to "water resources" might considerably broaden the scope of the provision. In this context it was suggested that if the Commission wished to deal with contamination of water supplies, it should do so in a separate article to avoid confusion. Also on the scope aspect, the remark was made that

---

(a) General conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;

(b) The establishment of adequate safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts.

3. Watercourse States shall exchange data and information concerning the protection of water resources and installations and, in particular, concerning the conditions, specifications, standards and measures mentioned in paragraph 2 of this draft article.

"Article [28]. Status of international watercourses and water installations in time of armed conflict

International watercourses and related installations, facilities and other works shall be used exclusively for peaceful purposes consonant with the principles enshrined in the Charter of the United Nations and shall be inviolable in time of international as well as internal armed conflicts."

article 27, although it appeared in the chapter entitled "Security of hydraulic installations", seemed to go further by providing that international watercourses as such should be maintained and protected. The opinion was expressed in this connection that the provision should be confined to hydraulic works and related installations, inasmuch as the protection of international watercourses was a much broader concept which was in a sense the object of the entire draft.

293. Some members furthermore queried the usefulness of the provision. Thus the opinion was expressed that article 27 dealt with subjects that differed too much and were dealt with in other parts of the draft. In this connection the remark was made that the article simply repeated what was already stated in articles 6, 8 and 10 and that the issue was therefore more a matter of the application of those articles than of drafting a new article.

294. More specifically, one member observed that if, as had been proposed, the reference to the protection of watercourses were to be deleted, only three elements would be left in the article: the obligation for States to "employ their best efforts" to protect installations (paragraph 1); the obligation to enter into consultations concerning the establishment and operation of installations and the adoption of measures to protect them (paragraph 2); and the obligation to "exchange data and information concerning the protection of installations" (paragraph 3). He pointed out that, since the obligation set forth in paragraph 1 was already included in articles 6 and 8 while the one stated in paragraph 2 came under paragraph 3 of article 4 and the one provided for in paragraph 3, under paragraph 1 of article 10, the need for a provision on installations was doubtful.

295. The question was raised whether article 27 covered new (planned) or existing installations or both. In this connection, it was said that new installations represented a typical example of "planned measures with possible adverse effects", as envisaged in part III of the draft and that the residual rule on the safety of existing installations, the exchange of information relative thereto and, possibly, the establishment of safety standards would be most appropriately placed between article 10 on regular exchange of data and information and part III on planned measures.

296. Specific comments on the various parts of the article included the remark that the words "shall employ their best efforts" in paragraph 1 should be interpreted as establishing an international standard.

297. As regards paragraph 2, support was expressed for an unconditional obligation of watercourse States to enter into consultations, in view of the disastrous consequences that would ensue from the failure of a major installation or from the contamination of water supplies. Members who addressed the issue considered that the article should not only provide for an obligation to prohibit poisoning of water resources, but should also eliminate outdated nineteenth century concepts according to which it was permissible to cut the enemy's water supply, to dry up springs or to divert rivers from their courses. Another remark was that the paragraph did not provide an indication of the conditions and circumstances in which consultations and agreements would be required, and therefore lent itself to an interpretation whereby installations in a country which did not affect the international watercourse in another country could be made subject to a system of security on which that other country would have the right to give its opinion.

298. As regards paragraph 3, some members suggested that it might be preferable to group together all provisions relating to information.

299. In summing up the discussion of article 27, the Special Rapporteur noted that some members believed that the question of protection was already amply covered by other articles and that other members, while stressing the importance of the subject, had asked whether the article should not focus on the protection of installations without mentioning protection of watercourses.

300. With reference to suggestions that paragraph 2 went too far, since its provisions would apply even if there was no effect on another State, and that article 27 should be placed between article 10 and part III, the Special Rapporteur recognized that they were justified. He added that the idea of stating that the provisions of paragraph 3 were without prejudice to the exceptions set forth in article 20 should be taken into account.

301. Article 28 125/ elicited mixed reactions from members of the Commission. Some members regarded such a provision as beyond the scope of the draft articles. Others expressed reluctance to venture into the field of armed conflict for fear of the possibility of affecting, in some unforeseen way, the existing rules of international law governing that field. But a majority of members appeared to be in favour of attempting to address the subject, in view of its vital importance.

302. Questions were raised as to the meaning of the term "inviolable" in this context. Some members suggested that consistency with existing law could be achieved by making reference to the rules of international law governing armed conflict, which would include both customary and conventional law. The proposal was made by some members that express reference be made in a paragraph 2 to poisoning of international watercourses, which was characterized as both a war crime and a crime against humanity. Finally, it was suggested that the article should be divided into two parts, one concerning peaceful uses of international watercourses and the other dealing with their status in time of armed conflict.

303. In his summing up, the Special Rapporteur remarked that the article had been diversely received, some members considering it superfluous and others, on the contrary, viewing it as very important. He noted, however, that a majority of members seemed to be in favour of at least trying to address the subject. To be sure, some members had queried the meaning of the word "inviolable", which was indeed somewhat problematical and should perhaps be replaced by a more felicitous term. He considered as well taken the point made by several members that a reference to the rules of international law governing armed conflicts could be included. He had no objection either to the suggestion that poisoning of watercourses be expressly mentioned as a war crime and a crime against humanity, or to the suggestion that the article should be divided into two parts, one on peaceful uses and the other on armed conflicts.

125/ For the text, see footnote 124 above.

3. Annex I. Implementation of the draft articles 126/

304. In orally presenting section III of his report on implementation of the draft articles, the Special Rapporteur expressed the hope that members had not been inconvenienced by the fact that such a section had not been mentioned in

---

126/ The text of annex I proposed by the Special Rapporteur read as follows:

"ANNEX I

IMPLEMENTATION OF THE DRAFT ARTICLES

"Article 1

Definition

For the purposes of this annex, "watercourse State of origin" means a watercourse State within which activities are carried on or planned that affect or may affect an international watercourse [system] and that give rise or may give rise to appreciable harm in another watercourse State.

"Article 2

Non-discrimination

In considering the permissibility of proposed, planned or existing activities, the adverse effects that such activities entail or may entail in another State shall be equated with adverse effects in the watercourse State where the activities are or may be situated.

"Article 3

Recourse under domestic law

1. Watercourse States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction.

2. With the objective of assuring prompt and adequate compensation or other relief in respect of the appreciable harm referred to in paragraph 1, watercourse States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

the outline of the topic presented in his fourth report. It was his view that actual and potential watercourse problems should, in so far as possible, be resolved through civil law procedures - which would usually bring relief to

---

"Article 4

Equal right of access

1. A watercourse State of origin shall ensure that any person in another State who has suffered appreciable harm or is exposed to a significant risk thereof receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm, and in comparable circumstances, to persons of equivalent condition or status.

2. The treatment referred to in paragraph 1 of this draft article includes the right to take part in, or have resort to, all administrative and judicial procedures in the watercourse State of origin which may be utilized to prevent domestic harm or pollution, or to obtain compensation for any harm that has been suffered or rehabilitation of any environmental degradation.

"Article 5

Provision of information

1. A watercourse State of origin shall take appropriate measures to provide persons in other States who are exposed to a significant risk of appreciable harm with sufficient information to enable them to exercise in a timely manner the rights referred to in paragraph 2 of this draft article. To the extent possible under the circumstances, such information shall be equivalent to that provided in the watercourse State of origin in comparable domestic cases.

2. Watercourse States shall designate one or more authorities which shall receive and disseminate the information referred to in paragraph 1 in sufficient time to allow meaningful participation in existing procedures in the watercourse State of origin.

"Article 6

Jurisdictional immunity

1. A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States only in so far as it enjoys such immunity in respect of proceedings brought by its own nationals and habitual residents.

those suffering harm more expeditiously than diplomatic procedures and could prevent problems from escalating and becoming unnecessarily politicized. He recalled that in their statement in the Sixth Committee on the question of international liability for injurious consequences arising out of acts not

---

2. Watercourse States shall ensure, by the adoption of appropriate measures, that their agencies and instrumentalities act in a manner consistent with these draft articles.

"Article 7

Conference of the Parties

1. Not later than two years after the entry into force of the present draft articles, the Parties to the draft articles shall convene a meeting of the Conference of the Parties. Thereafter the Parties shall hold regular meetings, at least once every two years unless the Conference decides otherwise, and extraordinary meetings at any time upon the written request of at least one third of the Parties.

2. At the meetings provided for in paragraph 1, the Parties shall review the implementation of the present draft articles. In addition, they may:

(a) consider and and adopt amendments to the present draft articles in accordance with article 8 of this annex;

(b) receive and consider any reports presented by any Party or by any panel, commission or other body established pursuant to annex II to these draft articles; and

(c) where appropriate, make recommendations for improving the effectiveness of the present draft articles.

3. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 1 of this draft article.

4. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a party to the present draft articles, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

prohibited by international law, the Nordic countries had stressed the importance of civil liability régimes in ensuring compensation to victims and had adduced arguments which also applied to international watercourses since both topics dealt to some extent with transboundary harm. The Special Rapporteur agreed that there was a need for State and civil liability régimes to complement each other and for States to be encouraged to use

---

6. Any of the following categories of bodies or agencies which is technically qualified with regard to the non-navigational uses of international watercourses, including the protection, conservation and management thereof, and which has informed the Parties of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, observers representing these agencies and bodies shall have the right to participate but not to vote.

"*Article 8*

Amendment of the draft articles

1. An extraordinary meeting of the Conference of the Parties shall be held on the written request of at least one third of the Parties to consider and adopt amendments to the present draft articles. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For the purposes of the present draft article, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Party or Parties proposing it to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties that have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the [Depositary Government] [Secretary-General of the United Nations]. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment."

existing civil liability régimes, and indicated that such was the spirit in which he was submitting the eight draft articles on implementation contained in annex I.

305. A number of members commended the Special Rapporteur for his efforts to devise articles intended to make redress for injury available for individuals and expressed the opinion that the articles of the annex should be incorporated in the body of the draft articles, or at least, if that would avoid a possible bearing on the prospect of acceptance of the draft by States, in an optional part thereof. Others, however, observed that the annex contained obligations which were more appropriate for a small group of integrated States and that some of those obligations might require changes in national legislation and go beyond the limits of a framework agreement.

306. A number of members subscribed to the general approach underlying the Annex since its main point was to avoid a multiplication of inter-State disputes through the settlement of minor problems by domestic courts and through the action of individuals.

307. A number of members who spoke on the annex found it somewhat lacking in consistency. They suggested that some of its articles be transferred elsewhere, that others be further refined and that still others be altogether omitted. On the other hand, the view was expressed that the sixth report by the Special Rapporteur contained all the necessary elements of a part dealing with implementation and that although those elements would have to be reorganized, most of the ground work had already been done.

308. Some members felt that the title of the annex did not correspond to its contents, which did not so much concern implementation - an area already dealt with in many articles of the draft - as the active role to be played by individuals.

309. Specific comments on the articles of the annex included the remark that of the obligations enunciated in articles 2 to 5, only the one stipulated in article 3, paragraph 1, embodied a principle that could be expressed in a provision of part II, "General Principles" and that no other provision of the annex appeared necessary. Most members who spoke on article 6 considered that it should be deleted, in particular because the question of jurisdictional immunities was being dealt with under another draft. Article 7 was viewed as

unhelpful since each watercourse was a universe in itself and only States belonging to that universe would participate directly in the application in their territory of the rules embodied in the draft articles. Article 8 was also questioned on the ground that it was doubtful whether such a provision would be an improvement on the general procedure concerning amendments laid down in the Vienna Convention on the Law of Treaties.

310. The observation was made that the annex as a whole raised a problem with far-reaching implications, that of civil liability, since the draft had not so far dealt with actions which might be brought by individuals before the administrative or judicial organs of the State of origin. It was also noted that from the point of view of reparation machinery, the draft articles said nothing about the relationship between reparation claims brought by individuals and those which might be brought by States, and that that question required further in-depth study.

311. In his summing up, the Special Rapporteur noted that several speakers had criticized the title of the annex. He remarked that, although differing views had been expressed on articles 1 to 5, there had on the whole been substantial support for the ideas of non-discrimination and equal right of access as expressed in article 3, paragraph 1, and article 4 respectively. He, at the same time, noted that article 2 had been quite heavily criticized and that it seemed to be the general opinion that articles 6 to 8 went beyond the scope of a framework agreement. In the light of the above and even though some members had been in favour of referring articles 1 to 5 to the Drafting Committee *en bloc*, he had come to the conclusion that the annex was not yet ripe for such action. He therefore recommended that only article 3, paragraph 1, and article 4 should be referred to the Drafting Committee, without prejudice to whether they would ultimately be incorporated in the body of the draft or included in an annex or optional protocol, as some members had suggested. While agreeing that article 3, paragraph 2, could be considered to go beyond the scope of the topic and might therefore be omitted, he reserved the possibility of submitting proposals on this provision and on other articles of the annex at the next session, subject to the demands of brevity which would have to be borne in mind if the Commission was to complete the consideration of the draft articles in 1991.

C. Draft articles on the law of the non-navigational uses of international watercourses

1. Texts of the draft articles provisionally adopted so far by the Commission

312. The texts of the draft articles provisionally adopted so far by the Commission are reproduced below:

PART I

INTRODUCTION

Article 1 127/

[Use of terms] 128/

Article 2

Scope of the present articles

1. The present articles apply to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters.

127/ The Commission accepted a provisional working hypothesis as to what was meant by the term "international watercourse system".

The hypothesis was contained in a note which read as follows:

> "A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and ground water constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.
>
> An 'international watercourse system' is a watercourse system, components of which are situated in two or more States.
>
> To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse."

128/ The Commission agreed at its thirty-ninth session to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second (1980) session, see *ibid*. Thus, the word "system" appears in square brackets throughout the text.

56

2. The use of international watercourse[s] [systems] for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 3

Watercourse States

For the purposes of the present articles, a watercourse State is a State in whose territory part of an international watercourse [system] is situated.

Article 4

[Watercourse] [System] agreements

1. Watercourse States may enter into one or more agreements which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof. Such agreements shall, for the purposes of the present articles, be called [watercourse] [system] agreements.

2. Where a [watercourse] [system] agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the international watercourse [system].

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse [system], watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a [watercourse] [system] agreement or agreements.

Article 5

Parties to [watercourse] [system] agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any [watercourse] [system] agreement that applies to the entire international watercourse [system], as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse [system] may be affected to an appreciable extent by the implementation of a proposed [watercourse] [system] agreement that applies only to a part of the watercourse [system] or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

PART II

GENERAL PRINCIPLES

Article 6

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse [system] in an equitable and reasonable manner. In particular, an international watercourse [system] shall be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the international watercourse [system].

2. Watercourse States shall participate in the use, development and protection of an international watercourse [system] in an equitable and reasonable manner. Such participation includes both the right to utilize the international watercourse [system] as provided in paragraph 1 of this article and the duty to co-operate in the protection and development thereof, as provided in article ...

Article 7

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances, including;

(a) geographic, hydrographic, hydrological, climatic and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of an international watercourse [system] in one watercourse State on other watercourse States;

(d) existing and potential uses of the international watercourse [system];

(e) conservation, protection, development and economy of use of the water resources of the international watercourse [system] and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 6 or paragraph 1 of the present article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of co-operation.

Article 8 129/

Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.

Article 9 130/

General obligation to co-operate

Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimum utilization and adequate protection of an international watercourse [system].

Article 10 131/

Regular exchange of data and information

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

129/ This article is based on article 9 as proposed by the previous Special Rapporteur in 1984.

130/ This article is based on article 10 as proposed by the previous Special Rapporteur in 1987.

131/ This article is based on article 15 [16] as proposed by the Special Rapporteur in 1988.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

PART III

PLANNED MEASURES

Article 11

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

Article 12 [132]

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13 [133]

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

---

[132] This article is based on article 11 as proposed by the Special Rapporteur in 1987.

[133] This article is based on article 12 as proposed by the Special Rapporteur in 1987.

Article 14 134/

Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.

Article 15 135/

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding.

Article 16 136/

Absence of reply to notification

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

134/ *Ibid*.

135/ This article is based on article 13 as proposed by the Special Rapporteur in 1987.

136/ This article is based on article 14 as proposed by the Special Rapporteur in 1987.

Article 17 137/

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18 138/

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the States concerned shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consulations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

137/ This article is based on article 13 as proposed by the Special Rapporteur in 1987.

138/ This article is based on article 14 as proposed by the Special Rapporteur in 1987.

Article 19 [139]

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

Article 20 [140]

Data and information vital to national defence or security

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 21

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

---

[139] This article is based on article 15 as proposed by the Special Rapporteur in 1987.

[140] This article is based on article 15 [16] as proposed by the Special Rapporteur in 1988.

PART IV

PROTECTION AND PRESERVATION

Article 22

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourse[s] [systems].

Article 23

Prevention, reduction and control of pollution

1. For the purposes of the present draft articles, "pollution of an international watercourse [system]" means any detrimental alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct. *[*]*

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the international watercourse [system]. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse [system] is to be prohibited, limited, investigated or monitored.

Article 24

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system] which may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States.

---

*/ This paragraph which deals with the definition of pollution may be moved up to article 1 on [Use of terms].

Article 25

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse [system] that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 26

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 27

Emergency situations

1. For the purposes of the present draft article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct as for example in the case of industrial accidents. */

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in co-operation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies in co-operation, where appropriate, with other potentially affected States and competent international organizations.

---

*/ This paragraph which deals with the definition of emergency may be moved up to article 1 on [Use of terms].

2. Texts of draft articles 22 to 27 with commentaries thereto provisionally adopted by the Commission at its forty-second session

PART IV

PROTECTION AND PRESERVATION

Article 22

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourse[s] [systems].

Commentary

(1) Article 22 introduces Part IV of the draft articles by laying down a general obligation to protect and preserve the ecosystems of international "watercourse[s] [systems]". 141/ The article is based on paragraph 1 of article 17 [18] proposed in the Fourth report of the Special Rapporteur (A/CN.4/412/Add.2). In view of the general nature of the obligation contained in this article, the Commission was of the view that it should precede the other more specific articles in Part IV.

(2) Like article 192 of the 1982 United Nations Convention on the Law of the Sea, 142/ article 22 contains obligations of both protection and preservation. These obligations relate to the "ecosystems of international watercourse[s] [systems]", an expression utilized by the Commission because it is more precise than the concept of the "environment" of a watercourse. The latter term could be interpreted quite broadly, to apply to areas "surrounding" the watercourse [system] that have minimal bearing on the protection and preservation of the watercourse [system] itself. Furthermore, the term "environment" of a watercourse might be construed to refer only

---

141/ As in the case of the other articles adopted so far by the Commission on the present topic, the square brackets in the expression just quoted indicate that the Commission has deferred the question of the use of the term "system". See footnote 128, above.

142/ Article 192, entitled "General obligation", provides: "States have the obligation to protect and preserve the marine environment."

to areas outside the watercourse, which is of course not the intention of the Commission. For these reasons, the Commission preferred to utilize the term "ecosystem", which is believed to have a more precise scientific and legal meaning. 143/ Generally, that term refers to an ecological unit consisting of living and non-living components that are interdependent and function as a community. 144/ "In ecosystems, everything depends on everything else and nothing is really wasted." 145/ Thus, "[a]n external impact affecting one component of an ecosystem causes reactions among other components and may disturb the equilibrium of the entire ecosystem". 146/ Since "[e]cosystems support life on earth", 147/ such an "external impact", or interference, may impair or destroy the ability of an ecosystem to function as a life-support system. It goes without saying that serious interferences can be, and often are, brought about by human conduct. Human interferences may irreversibly disturb the equilibrium of freshwater ecosystems, in particular, rendering them incapable of supporting human and other forms of life. As observed in the Proposed Medium-Term Plan of the United Nations for the period 1992-1997:

143/ Reference may be made generally in this connection to the ongoing work of the Economic Commission for Europe in this field. See "Ecosystems approach to water management" (ENVWA/WP.3/R.7/Rev.1), and the case studies on the Oulujoki River (Finland), Lake Mjosa (Norway), the Lower Rhine River (Netherlands), and the Ivankovskoye Reservoir (Soviet Union) (ENVWA/WP.3/R.11/Add.1 and 2).

144/ "An ecosystem is commonly defined as a spatial unit of Nature in which living organisms and the non-living environment interact adaptively." (ENVWA/WP.3/R.7/Rev.1), p. 3, para. 9. The Expert Group on Environmental Law of the World Commission on Environment and Development, in the comment to Article 3 of its Legal principles and recommendations, defines "ecosystems" as "systems of plants, animals and micro-organisms together with the non-living components of their environment". Environmental Protection and Sustainable Development, Legal Principles and Recommendations (1987), p. 45.

145/ "Ecosystems approach to water management" (ENVWA/WP.3/R.7/Rev.1), p. 3, para. 9.

146/ *Ibid*., para. 11.

147/ *Ibid*., para. 9.

> "Interactions between freshwater ecosystems on the one hand and human activities on the other are becoming more complex and incompatible as socio-economic development proceeds. Water basin development activities can have negative impacts too, leading to unsustainable development, particularly where these water resources are shared by two or more States." 148/

The obligation to protect and preserve the ecosystems of international watercourse[s] [systems] addresses this problem, which is already acute in some parts of the world and which will become so in others as increasing human populations place ever greater demands on finite water resources. 149/

(3) The obligation to "protect" the ecosystems of international watercourse[s] [systems] is a specific application of the requirement contained in article 6 that watercourse States are to use and develop an international watercourse [system] in a manner that is consistent with adequate protection thereof. 150/ In essence, it requires that watercourse States shield the ecosystems of international watercourse[s] [systems] from harm or damage. It thus includes the duty to protect those ecosystems from a significant threat of harm. 151/ The obligation to "preserve" the ecosystems of international watercourse[s] [systems], while similar to that of protection, applies in particular to freshwater ecosystems that are in a pristine or unspoiled condition. It requires that these ecosystems be protected in such a way as to maintain them as much as possible in their

---

148/ Proposed Medium-Term Plan for the period 1992-1997, Major programme IV, International economic co-operation for development, Programme 16, Environment (A/45/6), p. 9, para. 16.24.

149/ See, e.g. "Water: the finite resource", IUCN Bulletin, volume 21, number 1, March 1990, p. 14.

150/ Article 6 entitled "Equitable and reasonable utilization and participation", para. 1, second sentence, reproduced in subsection 1 above.

151/ The obligation to protect the ecosystems of international watercourse[s] [systems] is thus a general application of the principle of precautionary action, discussed below (see note 176 and accompanying text below).

natural state. Together, protection and preservation of aquatic ecosystems help to ensure their continued viability as life support systems, thus providing an essential basis for sustainable development. [152]

(4) In requiring that watercourse States act "individually or jointly", article 22 recognizes that in some cases it will be necessary and appropriate that watercourse States co-operate, on an equitable basis, to protect and presrve the ecosystems of international watercourse[s] [systems]. The obligation to take such action "jointly" is a specific application of certain general obligations contained in Part II of the draft articles. Thus article 6 requires that watercourse States "participate in the ... protection of an international watercourse [system] in an equitable and reasonable manner", and provides that "[s]uch participation includes ... the duty to co-operate in the protection and development" of international watercourse[s] [systems]. [153] In addition, article 9 provides that watercourse States shall co-operate, *inter alia*, "in order to attain ... adequate protection of an international watercourse [system]." The requirement of article 22 that watercourse States act "individually or jointly" is therefore to be understood as meaning that joint, co-operative action is to be taken where appropriate, and that such action is to be taken on an equitable basis. For example, joint action would usually be appropriate in the case of contiguous watercourses or those being managed and developed as a unit. What constitutes action on an

---

[152] The following observation contained in the Proposed Medium-Term Plan is relevant in this connection: "The maintenance of biological diversity, which encompasses all species of plants, animals and micro-organisms and the ecosystems of which they are part, is a major element in achieving sustainable development." *Supra*, note 148, para. 16.7.

[153] Article 6, para. 2.

equitable basis will, of course, vary with the circumstances. 154/ Among the factors to be taken into account in this connection are the extent to which the watercourse States concerned have contributed to the problem and the extent to which they will benefit from its solution. Of course, the duty to participate equitably in the protection and preservation of the ecosystems of an international watercourse [system] is not to be regarded as implying an obligation to repair or tolerate harm that has resulted from another watercourse State's breach of its obligations under the draft articles. 155/ But the general obligation of equitable participation demands that the contributions of watercourse States to joint protection and preservation efforts be at least proportional to the measure in which they have contributed to the threat or harm to the ecosystems in question. Finally, it will be recalled that article 194 of the 1982 United Nations Convention on the Law of the Sea also requires that measures be taken "individually or jointly", in that case with regard to pollution of the marine environment. 156/ This provision reflects a recognition that joint protective action may be necessary with regard to ecosystems and natural resources that come within the jurisdiction of more than one State.

154/ See generally the commentaries to articles 6 and 7, Report of the International Law Commission on the work of its thirty-ninth session Official Records of the General Assembly, Forty-second session, Supplement No. 10 (A/42/10), pp. 70 et seq., and 83 et seq., respectively. For example, paragraph (1) of the commentary to article 7, referring to the obligation of equitable and reasonable utilization laid down in article 6, states as follows:

> "The latter rule is necessarily general and flexible, and requires for its proper application that States take into account concrete factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. What is equitable and reasonable utilization in an individual case will therefore depend upon a weighing of all relevant factors and circumstances."

Ibid., p. 83.

155/ Thus, for example, State A would be under no obligation to repair appreciable harm it had suffered solely as a result of the conduct of State B.

156/ United Nations Convention on the Law of the Sea, article 194, para. 1.

(5) There is ample precedent for the obligation contained in article 22 in the practice of States and the work of international organizations. Illustrations of these authorities are provided in the following paragraphs. 157/

(6) Provisions concerning the protection of the ecosystems of international watercourses may be found in a number of agreements. For example, in the 1975 Statute of the Uruguay River, Argentina and Uruguay agree to co-ordinate, through a commission established under the agreement, "appropriate measures to prevent the alteration of the ecological balance, and to control impurities and other harmful elements in the river and its catchment area". 158/ The parties further undertake to "agree on measures to regulate fishing activities in the river with a view to the conservation and preservation of living resources", 159/ and "To protect and preserve the aquatic environment ...". 160/ Similarly, in the 1978 Convention relating to the status of the River Gambia, Gambia, Guinea and Senegal agreed that "No project which is likely to bring about serious modifications on the characteristics of the river's régime, ... the sanitary state of the waters, the biological characteristics of its fauna and its flora ... will be implemented without the prior approval of the contracting States." 161/ The nine States parties to the 1963 Act regarding navigation and economic co-operation between the States

---

157/ For more extensive surveys of relevant authorities, see the Fourth report of the Special Rapporteur (A/CN.4/412), paras. 28-86; and the Third report of the second Special Rapporteur, *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/348, paras. 243-336.

158/ Statute of the Uruguay River, art. 36, Uruguay, Ministerio de Relaciones Exteriores, *Actos Internacionales Uruguay-Argentina, 1830-1980* (Montevideo, 1981), p. 593.

159/ *Ibid*., art. 37.

160/ *Ibid*., art. 41.

161/ Convention relating to the status of the River Gambia, 30 June 1978 (Gambia, Guinea, Senegal), reproduced in *Treaties concerning the Utilization of International Water Courses for Other Purposes than Navigation, Africa*, Natural Resources/Water Series No. 13, (ST/ESA/141) (1984), Treaty No. 10, p. 39, art. 4, p. 40 (hereafter referred to as "Natural Resources/Water Series No. 13").

of the Niger Basin "undertake to establish close co-operation with regard to the study and the execution of any project likely to have an appreciable effect on certain features of the régime of the River, its tributaries and sub-tributaries, ... the sanitary conditions of their waters, and the biological characteristics of their fauna and flora." 162/ The 1978 Agreement between Canada and the United States on Great Lakes Water Quality provides that "The purpose of the Parties is to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem." 163/

(7) A number of early agreements had as their object the protection of fish and fisheries. 164/ For example, the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters provides that "Factories, plants or establishments of any kind situated near the Doubs shall be prohibited from discharging into the water any waste or substances that may be harmful to fish ...". 165/ Other agreements in effect protect the

---

162/ Act regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Chad, Dahomey, Guinea, Ivory Coast (Côte d'Ivoire), Mali, Niger, Nigeria, Upper Volta (Burkina Faso)), 26 October 1963, art. 4, United Nations Treaty Series, vol. 587, No. 8506, p. 9. Also reproduced in Natural Resources/Water Series No. 13, p. 6, at p. 7.

163/ Article II. United States Government Printing Office, Treaties and Other International Acts Series, No. 9257.

164/ 1868 Final Act of the delimitation of the international frontier of the Pyrenees between France and Spain, sect. I, clause 6, United Nations, Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation (United Nations publication-Sales No.: 63.V.4) (hereafter cited as "Legislative Texts ..."), Treaty No. 186, pp. 674 and 676, summarized in Yearbook ... 1974, vol. II (Part Two), p. 182, document A/5409, paras. 979 and 980 (c). See also e.g. the 1887 Convention between Switzerland and the Grand Duchy of Baden and Alsace-Lorraine, Legislative Texts ..., Treaty No. 113, p. 397, art. 10; the 1906 Agreement between Switzerland and Italy establishing provisions in respect of fishing in frontier waters, Legislative Texts ..., Treaty No. 230, p. 839, art. 12, para. 5, summarized in Yearbook ... 1974, vol. II (Part Two), document A/CN.4/274, para. 633; and the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters, Legislative Texts ..., Treaty No. 196, p. 701, arts. 6, 11 and 17.

165/ Legislative Texts ..., Treaty No. 196, p. 701, art. 17 at p. 706.

ecosystems of international watercourse[s] [systems] by protecting the waters thereof against pollution. The 1958 Treaty between the Soviet Union and Afghanistan concerning the régime of the Soviet-Afghan State frontier, for example, provides that "The competent authorities of both Contracting Parties shall take the necessary measures to protect the frontier waters from pollution by acids and waste products and from fouling by any other means.". 166/ And the 1956 Convention concerning the canalization of the Moselle between the Federal Republic of Germany, France and Luxembourg provides that the parties "shall take the necessary measures to protect the waters of the Moselle and its tributaries against pollution ...". 167/

(8) The need to protect and preserve the ecosystems of international watercourse[s] [systems] is also recognized in the work of international organizations, conferences and meetings. The Act of Asunción, adopted by the Fourth Meeting of Foreign Ministers of the Plata River Basin States in 1971, 168/ refers to the "grave health problems arising from ecological relationships in the geographic area of the River Plate Basin, which have an unfavourable impact on the social and economic development of the region", and notes that "this health syndrome is related to the quality and quantity of the water resources". 169/ The Act also mentions "The need to control water pollution and preserve as far as possible the natural qualities of the water as an integral part of a policy in the conservation and utilization of the water resources of the Basin ...". 170/ Among the decisions adopted by the United Nations Water Conference, held at Mar del Plata in 1977, is a recommendation entitled "Environment and health", which provides that "It is

---

166/ *Ibid*., Treaty No. 86, p. 276, art. 13.

167/ *Ibid*., Treaty No. 123, p. 424, art. 55.

168/ Reproduced in *Yearbook ... 1974*, vol. II (Part Two), document A/CN.4/274, para. 326.

169/ *Ibid*., Resolution No. 15.

170/ *Ibid*., p. 323.

necessary to evaluate the consequences which the various uses of water have on the environment, to support the measures aimed at controlling water-related diseases, and to protect ecosystems." 171/

(9) In addition to the instruments concerning the protection and preservation of the ecosystems of international watercourses, a number of agreements, resolutions, declarations and other instruments recognize the importance of protecting and preserving the environment in general, or ecosystems other than those of watercourses, in particular. These instruments are of present interest because they may either include, or be analogous to, an obligation to protect and preserve the ecosystems of international watercourse[s] [systems]. A number of these authorities may be mentioned for purposes of illustration. Agreements concerning the environment in general include the 1968 African Convention on the Conservation of Nature and Natural Resources 172/ and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources. 173/ Reference has already been made to the analogous obligation "to protect and preserve the marine environment" contained in

---

171/ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (E/CONF.70/29) (United Nations publication-Sales No.: E.77.II.A.12), p. 25.

172/ Natural Resources/Water Series No. 13, *supra*, note 161, p. 2. See especially article II, "Fundamental principle", in which the parties "undertake to adopt the measures necessary to ensure conservation, sustainable utilization and development of soil, water, air, floral and faunal resources" taking into account the necessity of maintaining essential ecological processes ...", and article V, "Water and air", in which the parties agree to "establish and implement policies designed to maintain air- and water-based essential ecological processes ...".

173/ Adopted on 7 September 1985 by Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. See especially article 1, "Fundamental principle", in which the parties undertake to adopt "the measures necessary to maintain essential ecological processes and life-support systems ...", and article 8, "Water", in which the parties recognize "the role of water in the functioning of natural ecosystems ..." and agree to endeavour to assure sufficient water supply "for, *inter alia*, the maintenance of natural life supporting systems and aquatic fauna and flora ...".

article 192 of the 1982 United Nations Convention on the Law of the Sea, 174/ which is complemented by a number of more specific agreements concerning the protection of the marine environment. 175/ In addition, the principle of precautionary action reflected in article 22 has found expression in a number of international agreements and other instruments. 176/ Also of general

---

See also, e.g. the 1940 Washington Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, United Nations *Treaty Series*, vol. 161, p. 193; the 1972 Paris Convention concerning the Protection of World Cultural and Natural Heritage, *International Legal Materials*, vol. XI (1972), p. 1358; the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats, *European Treaty Series*, No. 104 and the 1986 Convention for the Protection and Development of the Natural Resources and Environment of the South Pacific Region, *International Legal Materials*, vol. XXVI (1987), p. 41.

174/ See *supra*, note 142.

175/ See, e.g.: the 1981 Convention for co-operation in the protection and development of the marine and coastal environment of the West and Central African Region, Natural Resources/Water Series No. 13, *supra*, note 161, p. 2; the 1974 Convention on the prevention of pollution from land-based sources, *International Legal Materials*, vol. XIII (1974), p. 352; the 1974 Convention on the protection of the marine environment of the Baltic Sea area, *ibid*., p. 546; the 1976 Convention on the protection of the Mediterranean Sea against pollution, *ibid*., vol. XV (1976) p. 290, and its 1980 Protocol, *ibid*., vol. XX (1980), p. 873; and the 1978 Kuwait Regional Convention for co-operation in the protection of the marine environment from pollution, *ibid*., vol. XVII (1978), p. 511.

176/ The principle of precautionary action has been applied especially in instruments concerning the ozone layer and land-based marine pollution. With regard to the ozone layer, see the 1985 Vienna Convention for the Protection of the Ozone Layer, *International Legal Materials*, vol. XXVI (1987), p. 1516, and its 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, *ibid*., p. 1541. Concerning land-based and other forms of marine pollution, see, e.g. Decision 15/27 adopted by the Governing Council of the United Nations Environment Programme at its fifteenth session on 25 May 1989 under the title "Precautionary approach to marine pollution, including waste-dumping at sea"; and the Ministerial Declarations of the Second and Third International Conferences on the Protection of the North Sea (London, 24-25 November 1987 and The Hague, 8 March 1990, respectively). The Ministerial Declarations specify that the precautionary principle entails the taking of action to avoid potentially damaging impacts of dangerous substances (i.e., those that are persistent, toxic or bioaccumulative) "even before a causal link [between emissions and effects] has been established by absolutely clear scientific evidence ...".

relevance, as evidence of a recognition by States of the necessity of protecting essential ecological processes, are the numerous declarations and resolutions concerning the preservation of the environment. These include the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, [177] the General Assembly 1982 resolution on the World Charter for Nature, [178] the 1989 Amazon Declaration, [179] the 1989 Draft American Declaration on the Environment, [180] the 1988 ECE Declaration on Conservation of Flora, Fauna and their Habitats, [181] the 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region [182] and the Hague Declaration on the Environment of 11 March 1989. [183] The importance of maintaining the "the ecological balance" [184] in utilizing natural resources, and of following "the ecosystems aproach" [185] to the protection of water quality, have also been recognized in instruments adopted within the framework of the Conference on Security and Co-operation in Europe (CSCE). Finally the work of the World Commission on Environment and Development 186/ and its Experts Group on Environmental Law 187/ also emphasize that maintaining ecosystems and related ecological processes is essential to the achievement of sustainable development. 188/

---

[177] Adopted on 16 June 1972 (A/CONF.48/14, pp. 2 *et seq*). See especially Principles 2 to 5 and 12.

[178] Resolution 37/7 of 28 October 1982.

[179] A/44/275, E/1989/79, Annex.

[180] Organization of American States, document CJI/RES.II-10/89.

[181] Adopted by the Economic Commission for Europe at its forty-third session in 1988, decision E (43) (E/ECE/1172 and ECE/ENVWA/6). In the Declaration, the ECE Governments agree, *inter alia*, to pursue the aim of "conserv[ing] living natural resources in the interests of present and future generations by maintaining essential ecological processes and life-support systems, preserving genetic diversity and ensuring sustainable utilization of species and ecosystems ..." (*Ibid*.), operative para. 1.

[182] The Declaration recognizes, *inter alia*, in its paragraph 6, that "The challenge of sustainable development of humanity depends on providing sustainability of the biosphere and its ecosystems ...".

[183] *International Legal Materials*, vol. XXVIII (1989), p. 1308.

[184] Helsinki Final Act (CSCE/CC/64), p. 54.

[185] Report on Conclusions and Recommendations of the 1989 Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, held in Sofia (CSCE/SEM.36/Rev.1), p. 12.

Article 23

Prevention, reduction and control of pollution

> 1. For the purposes of the present draft articles, "pollution of an international watercourse [system]" means any detrimental alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct. */

---

*/ This paragraph which deals with the definition of pollution may be moved up to article 1 on [Use of terms].

186/ Our Common Future (1987).

187/ Supra, note 144, especially article 3, "Ecosystems, related ecological processes, biological diversity, and sustainability", at p. 45.

188/ See, to the same effect, the Environmental Perspective to the Year 2000 and Beyond, e.g. paras. 2 and 3(d), adopted by the Governing Council of the United Nations Environment Programme (Official Records of the General Assembly, Forty-second Session, Supplement No. 25, document A/42/25, annex II) and subsequently adopted by the General Assembly in resolution 42/186 of 11 December 1987 "as a broad framework to guide national action and international co-operation on policies and programmes aimed at achieving environmentally sound development".

Also to the same effect are certain provisions of the Constitution of the Republic of Namibia, which entered into force on 21 March 1990, including art. 91 (concerning fuctions of the Ombudsman), para. (c), and art. 95 (concerning "Promotion of the Welfare of the People"), para. (1). According to the latter, for example, "The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: ... (1) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and the utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future ...".

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the international watercourse [system]. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse [system] is to be prohibited, limited, investigated or monitored.

Commentary

(1) Article 23 establishes the fundamental obligation to prevent, reduce and control the pollution of international watercourse[s] [systems]. The article is based on article 16 [17] proposed in the Fourth report of the Special Rapporteur (A/CN.4/412/Add.2). It contains three paragraphs, the first of which defines the term "pollution", while the second lays down the obligation just referred to, and the third establishes a procedure for drawing up agreed lists of dangerous substances that should be subjected to special controls.

(2) Paragraph 1 contains a general definition of the term "pollution", as that term is used in the present draft articles. While it contains the basic elements found in other definitions of the term, [189] paragraph 1 is more

---

[189] See, e.g. article IX of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted in 1966 by the International Law Association (ILA), Report of the Fifty-second Conference (1967), p. 484; article I, para. 1, of the "Athens Resolution on the Pollution of Rivers and Lakes and International Law, adopted by the Institute of International Law in 1979; Annuaire de l'Institut de droit international, 1979, vol. 58, Part Two, p. 199; part A, para. 3, of the 1974 Principles concerning transfrontier pollution of the Organisation for Economic Co-operation and Development (OECD) Recommendation C(74) 222 of 14 November 1974, reprinted in OECD and the Environment (1986); article 2, para. 1, of the Montreal Rules of international law applicable to transfrontier pollution, adopted by the International Law Association in 1982, Report of the Sixtieth Conference (Montreal) (1982); article 1, para. 4, of the 1982 United Nations Convention on the Law of the Sea; article 1 of the 1979 ECE Convention on long-range transboundary air pollution; article 1, para. (c), of the Council of Europe's 1969 draft European Convention on the protection of fresh water against pollution; and article 1, para. (d), of the Council of Europe's 1974 draft European Convention for the protection of international watercourses against pollution, in Yearbook ... 1974, vol. II (Part Two), document A/CN.4/274, para. 376.

general in several respects. First, it does not mention any particular type of pollution or polluting agent (e.g. substances or energy), unlike some other definitions. Second, the definition simply refers to "any detrimental alteration" and thus does not prejudge the question of the threshold at which pollution become impermissible. This threshold is addressed in paragraph 2. The definition is thus a purely factual one. It encompasses all pollution, whether or not it results in "appreciable harm" to other watercourse States within the meaning of article 8 and, more specifically, paragraph 2 of article 23. Third, in order to preserve the factual character of the definition, paragraph 1 does not refer to any specific "detrimental" effects, such as harm to human health, property or living resources. Examples of such effects that rise to the level of "appreciable harm" are provided in paragraph 2. The definition requires only that there be a detrimental alteration in the "composition or quality" of the water. The term "composition" refers to all substances contained in the water, including solutes, as well as suspended particulate matter and other insoluble substances. The term "quality" is commonly used in relation to pollution, especially in such expressions as "air quality" and "water quality". While it is difficult, and perhaps undesirable, to define the term precisely, it refers generally to the essential nature and degree of purity of water. Fourth, the definition does not refer to the means by which pollution is caused, such as by the "introduction" of substances, energy, etc., into a watercourse. It requires only that the "detrimental alteration" result from "human conduct". The latter expression is understood to include both acts and omissions, and was thus considered preferable to such terms as "activities". Finally, the definition does not include "biological" alterations. While there is no doubt that the introduction into a watercourse of alien or new species of flora and fauna may have harmful effects upon the quality of the water, the introduction of such living organisms is not generally regarded as "pollution", per se. Biological alterations are therefore the subject of a separate article, in fine article 24.

(3) Paragraph 2 sets forth the general obligation of watercourse States to "prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to

their environment ...". This paragraph is a specific application of the general obligation contained in article 8 not to cause appreciable harm to other watercourse States. The various elements of paragraph 2 are dealt with in the following paragraphs of the commentary.

(4) In applying the general obligation of article 8 to the case of pollution, the Commission took into account the practical consideration that some international watercourse[s] [systems] are already polluted to varying degrees, while others are not. In light of this state of affairs, it employed the formula, "prevent, reduce and control" in relation to the pollution of international watercourse[s] [systems]. This expression is utilized in the 1982 United Nations Convention on the Law of the Sea in connection with marine pollution, 190/ with respect to which the situation is similar. The obligation to "prevent" relates to new pollution of international watercourse[s] [systems], while the obligations to "reduce" and "control" relate to existing pollution. Thus, watercourse States must take whatever steps are necessary to prevent new pollution from existing or planned activities, such as factories, sewage disposal systems, or irrigation projects, to the extent that such pollution "may cause appreciable harm to other watercourse States or to their environment". As with the obligation to "protect" ecosystems under article 22, the obligation to "prevent ... pollution ... that may cause appreciable harm" includes the duty to prevent the threat of such harm. 191/ This obligation is signified by the words "may cause". Furthermore, as in the case of article 22, the principle of precautionary action is applicable, especially in respect of dangerous substances such as those that are toxic, persistent or bioaccumulative. 192/ The requirement that watercourse States "reduce and control" existing

---

190/ United Nations Convention on the Law of the Sea, article 194, para. 1.

191/ See paragraph (3) of the commentary to article 22.

192/ See the commentary to article 22, especially paragraph (3), note 151 and accompanying text, and paragraph (9), note 176 and accompanying text.

pollution reflects the practice of States, in particular those in whose territories polluted watercourses are situated. This practice indicates a general willingness to tolerate even appreciable pollution harm, provided - and this is an important proviso - that the watercourse State of origin is making its best efforts to reduce the pollution to a mutally acceptable level. 193/ A requirement that existing pollution causing such harm be abated immediately could, in some cases, result in undue hardship, especially where the detriment to the watercourse State of origin was grossly disproportionate to the benefit that would accrue to the watercourse State experiencing the harm. 194/ On the other hand, failure of the watercourse State of origin to exercise due diligence in reducing the pollution to acceptable levels would entitle the affected State to claim that the State of origin had breached its obligation to do so.

(5) Like article 22, paragraph 2 of article 23 requires that the measures in question be taken "individually or jointly". The remarks made in paragraph (4) of the commentary to article 22 apply, mutatis mutandis, with regard to paragraph 2 of article 23. Thus, the requirement that watercourse States act "individually or jointly" to prevent, reduce and control water pollution is to be understood as meaning that joint, co-operative action is to be taken where appropriate, and that such action is to be taken on an equitable basis. As explained in the commentary to article 22, the obligation to take joint action derives from certain general obligations contained in Part II of the draft articles. In the case of paragraph 2 of article 23, the obligation of watercourse States under article 6 to "participate in the ... protection of an international watercourse [system] in an equitable and reasonable manner", as well as that under article 9 to "co-operate ... in

---

193/ See the Fourth report of the Special Rapporteur (A/CN.4/412/Add.2), para. (11) of the comments to art. 16[17], at pp. 12-13. This assessment of the practice of States is also reflected in the most recent comprehensive study of the subject: see J. Lammers, Pollution of International Watercourses (1984) p. 301.

194/ This position is in accord with that taken in the Helsinki Rules of the International Law Association. See especially comment (d) to article XI. ILA, Helsinki Rules, supra, note 189, pp. 503-504.

order to attain ... adequate protection of an international watercourse [system]" may, in some situations, call for joint participation in the application of pollution control measures. 195/ These obligations contained in articles 6 and 9 are also relevant to the duty to harmonize policies, addressed in paragraph (7) below.

(6) The obligations of prevention, reduction and control all apply to pollution "that may cause appreciable harm to other watercourse States or to their environment". Pollution below that threshold would not fall within paragraph 2 but, depending upon the circumstances, might be covered either by article 22 or by article 25, to be discussed below. Several examples of appreciable harm that pollution may cause to a watercourse State or to its environment are provided at the end of the first sentence of paragraph 2. The list is preceded by the word "including", which indicates that it does not purport to be exhaustive, but is provided for purposes of illustration only. Pollution of an international watercourse [system] may cause harm not only to "human health or safety" or to "the use of the waters for any beneficial purpose" 196/ but also to "the living resources of the international watercourse [system]", flora and fauna dependent upon the watercourse, and the amenities connected with it. 197/ The term "environment" of other watercourse

---

195/ Such participation and co-operation may take a number of forms, including the provision of technical assistance, joint financing, the exchange of specific data and information, and similar forms of joint participation and co-operation. To the same effect, see comment (b) to article X of the Helsinki Rules. Helsinki Rules, *ibid*., p. 499.

196/ The Commission recognises that it may be regarded as somewhat awkward to speak of "harm ... to the use of waters ...", but preferred not to use another expression (such as, for example, "interference with the use of the waters"), at least at the present stage of its work, since other expressions could raise doubts as to whether a uniform standard was being applied in the case of each illustration. The present wording leaves no doubt that the same standard - that of appreciable harm - is utilized in all illustrations.

197/ Such amenities may include, e.g. the use of a watercourse for recreational purposes or for tourism.

States is intended to encompass, in particular, matters of the latter kind. 198/ It is thus broader than the concept of the "ecosystem" of an international watercourse [system], which is the subject of article 22.

(7) The final sentence of paragraph 2 requires watercourse States to "take steps to harmonize their policies" concerning the prevention, reduction and control of water pollution. This obligation, which is grounded in treaty practice 199/ and which has a counterpart in the 1982 United Nations Convention on the Law of the Sea, 200/ addresses the problems that often arise when States adopt divergent policies, or apply different standards, concerning the pollution of international watercourse[s] [systems]. For example, if the standards applied by watercourse State A are quite stringent, while those of watercourse State B are less so, the less stringent standards of State B, if they prove inadequate, may frustrate State A's efforts to prevent, reduce and control pollution of the portion of the watercourse in its territory, or at

---

198/ Appreciable pollution harm to the "environment" of a watercourse State could also take the form of harm to human health in the form of diseases, or their vectors, carried by water. While harm to "human health" is expressly mentioned in paragraph 2, other forms of appreciable harm that are not directly connected with the use of water may also result from pollution of an international watercourse [system].

199/ International agreements concerning water pollution normally have as one of their explicit or implicit objects the harmonization of the relevant policies and standards of the watercourse States concerned. This is true whether the agreement concerns the protection of fisheries (see, e.g. article 17 of the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters, Legislative Texts ..., supra, note 164, Treaty No. 196, p. 706), or the prevention of adverse effects upon certain uses (see, e.g. article 4, para. 10 of the 1960 Indus Waters Treaty between India and Pakistan, Legislative Texts ..., supra, note 164, Treaty No. 97, p. 300), or actually sets water quality standards and objectives (see, e.g. the 1978 Agreement between Canada and the United States on Great Lakes Water Quality, e.g. article II, supra, note 163). Thus, harmonization may be achieved by agreement upon specific policies and standards or by requiring that pollution not exceed levels necessary for the protection of a particular resource, use or amenity. See generally the discussion of international agreements concerning water pollution in the Fourth report of the Special Rapporteur (A/CN.4/412/Add.1), paras. 39-48.

200/ United Nations Convention on the Law of the Sea, article 194, para. 1.

least decrease the value of those efforts. Such problems manifest themselves most dramatically in the case of contiguous watercourses, and lakes or aquifers that straddle boundaries, as well as in situations in which the policies and standards of an upstream State are less stringent than those of its downstream neighbour. But they may also arise in other situations. For example, the less stringent standards of a downstream State may result in harm to fish that migrate to a State lying upstream. Harmonization of the policies of the various watercourse States concerning water pollution will help to mitigate or avoid these problems. The duty to harmonise policies is a specific application of certain of the general obligations contained in articles 6 and 9, mentioned in paragraph (4) of the commentary to this article, particularly the obligation of watercourse States under article 9 to "co-operate ... in order to attain ... adequate protection of an international watercourse [system]". In the present case, this means that watercourse States are to work together in good faith to achieve and maintain harmonization of their policies concerning water pollution. Harmonization of policies is thus a process in two different senses. First, initial achievement of harmonization will often involve several steps or stages; it is this aspect of the process that is addressed in paragraph 2, as indicated by the words "take steps". Second, even after policies have been successfully harmonized, continuing co-operative efforts will ordinarily be required to maintain their harmonization as conditions change. The entire process will necessarily depend on consensus among watercourse States. In any event, the idea of harmonization does not imply that policies must be identical, only that conflicts among them should be avoided or removed.

(8) Paragraph 3 requires watercourse States to enter into consultations, if one or more of them should so request, with a view to drawing up lists of substances which, by virtue of their dangerous nature, should be subjected to special regulation. Such substances are principally those that are toxic, persistent or bioaccumulative. The practice of establishing lists of substances whose discharge into international watercourse[s] [systems] is either prohibited or subject to special regulation has been followed in a

84

number of international agreements and other instruments. 201/ States have made the discharge of these substances subject to special régimes because of their particularly dangerous and long-lasting nature. Indeed, the objective of some of the recent agreements dealing with these substances is to eliminate them entirely from the watercourses in question. 202/

(9) A detailed survey of representative illustrations of international agreements, the work of international organizations, decisions of international courts and tribunals, and other instances of State practice supporting article 23 is contained in the Fourth report of the Special Rapporteur. 203/ A recent study lists 88 international agreements "containing substantive provisions concerning pollution of international watercourses". 204/ The work

---

201/ See, e.g. the 1976 Convention on the Protection of the Rhine against Chemical Pollution, United Nations, Treaty Series, vol. 1124, p. 375; the 1978 Agreement between Canada and the United States on Great Lakes Water Quality, supra, note 163.

See also the Council of Europe's draft European Convention for the protection of international watercourses against pollution, supra, note 189; article III, para. 2, of the Institute of International Law's Athens Resolution on the Pollution of Rivers and Lakes and International Law, supra, note 189; and article 2 of the International Law Association's 1982 Montreal Rules on Water Pollution, ILA, Report of the Sixtieth Conference (Montreal, 1982), pp. 13, 535.

The same approach has also been used in the field of marine pollution. See especially the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, International Legal Materials, vol. XI (1972), p. 1294. This agreement separates harmful wastes into three categories: those whose discharge is prohibited altogether; those whose discharge is subject to a prior special permit; and those whose discharge is subject only to a prior general permit.

202/ Illustrations of such agreements are provided in the preceding footnote.

203/ A/CN.4/412/Add.1, paras. 38-88.

204/ J. Lammers, supra, note 193, pp. 124 et seq. See also the survey by J.J.A. Salmon, conducted in connection with the study by the Institute of International Law of "Les obligations relatives à la protection du milieu aquatique", in Annuaire de l'Institut de droit international, 1979, vol. 58, Part One, pp. 195-200 and 268-271.

of international non-governmental organizations concerned with international law and groups of experts in this field has been particularly rich. 205/ These authorities evidence a long-standing concern of States with the problem of pollution of international watercourses. States have stepped up their efforts to deal with the problem as water pollution has become more serious, and as they have become increasingly aware of the close and interdependent relationship between nature and humankind. These considerations are reflected in article 23, which contains a set of general obligations that are necessary for the protection of watercourse States against pollution.

Article 24

Introduction of alien or new species

> Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system] which may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States.

Commentary

(1) The introduction of alien or new species of flora or fauna into a watercourse can upset its ecological balance and result in serious problems including the clogging of intakes and machinery, the spoiling of recreation, the acceleration of eutrophication, the disruption of food webs, the elimination of other, often valuable species, and the transmission of disease. Once introduced, alien and new species can be highly difficult to eradicate. Article 24 addresses this problem by requiring watercourse States

---

205/ This is especially true of the Institute of International Law and the International Law Association. For the Institute of International Law, see especially the 1979 Athens Resolution on the Pollution of Rivers and Lakes and International Law, *supra*, note 189. For the International Law Association, see the Helsinki Rules, *supra*, note 189, articles IX-XI; the 1982 Montreal Rules on water pollution in an international drainage basin, *supra*, note 201; and the Seoul Rules on international groundwaters, article 3, Report of the ILA Committee on International Water Resources Law, Seoul Conference (1986), p. 38. See also the Legal Principles for Environmental Protection and Sustainable Development elaborated by the Experts Group on Environmental Law of the World Commission on Environment and Development, *supra*, note 144.

to take all measures necessary to prevent such introduction. A separate article is necessary to cover this subject because, as already noted, the definition of "pollution" contained in paragraph 1 of article 22 does not include biological alterations. 206/ A similar provision, relating to the protection of the marine environment, is contained in article 196 of the 1982 United Nations Convention on the Law of the Sea. 207/

(2) The term "species" includes both flora and fauna, i.e., plants, animals and other living organisms. 208/ The term "alien" refers to species that are non-native, while "new" encompasses species that have been genetically altered or produced through biological engineering. As is clear from its terms, the article concerns the introduction of such species only into the watercourse itself, and does not concern fish farming or other activities that are conducted outside the watercourse. 209/

(3) Article 24 requires watercourse States to "take all measures necessary" to prevent the introduction of alien or new species. This expression, which is also utilized in article 196 of the 1982 United Nations Convention on the Law of the Sea, indicates that watercourse States are to undertake studies, in so far as they are able, and take the precautions that are required to prevent alien or new species from being introduced into a watercourse by public authorities or private persons. The obligation is one of due diligence, and will not be regarded as having been breached if a watercourse State has done all that can reasonably be expected to prevent the introduction of such species.

206/ See paragraph (2) of the commentary to article 22.

207/ 1982 United Nations Convention on the Law of the Sea, art. 196, para. 1.

208/ Thus the term would include parasites and disease vectors.

209/ Appropriate precautionary measures may be required, however, to prevent any alien or new species involved in such activities from making their way into the watercourse.

(4) The "introduction" that watercourse States are to take all measures necessary to prevent is one that "may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States". While any introduction of an alien or new species into an international watercourse [system] should be treated with great caution, the Commission was of the view that the relevant legal obligation under the present draft articles should be kept in harmony with the general rule contained in article 8. Since detrimental effects of alien or new species will, almost invariably, manifest themselves first upon the ecosystem of a watercourse, this link between the "introduction" of the species and appreciable harm was included in the article. As in the case of paragraph 2 of article 23, the use of the word "may" indicates that precautionary action is necessary to guard against the very serious problems that alien or new species may cause. While the term "environment" was included for purposes of emphasis in paragraph 2 of article 23, it perhaps goes without saying that the "appreciable harm to other watercourse States" contemplated in the present article includes harm to the environment of those States. Finally, as is true of other aspects of the protection of international watercourse[s] [systems], joint, as well as individual action may be called for in preventing the introduction of alien or new species into international watercourse[s] [systems].

Article 25

Protection and preservation of the marine environment

> Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse [system] that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

Commentaries

(1) Article 25 addresses the increasingly serious problem of pollution that is transported into the marine environment by international watercourse[s] [systems]. While the impact of such pollution upon the marine environment, including estuaries, has been recognized only relatively recently, it is now dealt with, directly or indirectly, in a number of agreements. In particular,

the obligation not to cause pollution damage to the marine environment from land-based sources is recognized both in the 1982 United Nations Convention on the Law of the Sea 210/ and in conventions concerning various regional seas. 211/

(2) The obligation set forth in article 25 is not, however, to protect the marine environment, per se, but to take the measures "with respect to an international watercourse [system]" that are necessary to protect that environment. But the obligation of watercourse States under article 25 is separate from, and additional to, the obligations set forth in articles 22 to 24. Thus, a watercourse State could conceivably damage an estuary through pollution of an international watercourse [system] without breaching its obligation not to cause appreciable harm to other watercourse States. Article 25 would require the former watercourse State to take the measures necessary to protect and preserve the estuary.

(3) The expression "take all measures ... necessary" has the same meaning, mutatis mutandis, as in article 24. 212/ In the present case, watercourse States are to take all of the necessary measures of which they are capable, financially and technologically. The expression "individually or jointly" also has the same meaning, mutatis mutandis, as in articles 22 213/ and 23, paragraph 2. 214/ Thus, where appropriate, watercourse States are to take joint, co-operative action to protect the marine environment from pollution carried there by an international watercourse [system]. Such action is to be

---

210/ See article 194, para. 3 (a), and article 207.

211/ See e.g. the agreements cited in supra, note 175. See also the Ministerial Declarations of the various International Conferences on the Protection of the North Sea: the First International Conference (Bremen, 31 October-1 November 1984); the Second International Conference (London, 24-25 November 1987); and the Third International Conference (The Hague, 8 March 1990).

212/ See paragraph (3) of the commentary to article 24.

213/ See paragraph (4) of the commentary to article 22.

214/ See paragraph (5) of the commentary to article 23.

taken on an equitable basis, which means that the obligation of watercourse States to participate in the measures in question is a function of their responsibility for the damage to the marine environment, or threat thereof. The terms "protect" and "preserve" have the same meaning, mutatis mutandis, as in article 22. [215] In the present case, the obligation to "protect" includes the duty to take the measures necessary with respect to an international watercourse [system] to protect the marine environment against harm from both pollution and new or alien species. Without prejudice to its meaning in the 1982 United Nations Convention on the Law of the Sea and other international agreements, the expression "marine environment" is understood to include, inter alia, the water, flora and fauna of the sea, as well as the sea-bed and ocean floor. [216]

(4) The article concludes with the phrase, "taking into account generally accepted international rules and standards", which has also been utilized in the 1982 United Nations Convention on the Law of the Sea. [217] The phrase refers both to rules of general international law and to those derived from international agreements, as well as to standards adopted by States and international organizations pursuant to those agreements. [218] Watercourse States are to take these rules and standards into account in planning and implementing the measures to be taken under the present article, with a view to ensuring that such measures are consistent with any applicable rules and standards governing protection and preservation of the marine environment.

---

[215] See paragraph (3) of the commentary to article 22.

[216] The expression "marine environment" is not defined in the 1982 Convention. "Pollution of the marine environment" is, however, defined in article 1, para. (4).

[217] See, e.g. article 211, para. 2.

[218] See, in particular, the agreements referred to in supra, notes 210 and 211.

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 26

Prevention and mitigation of harmful conditions

> Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Commentary

(1) Article 26 deals with a wide variety of "conditions" related to international watercourse[s] [systems] that may be harmful to watercourse States. While it may be debated whether the harm results from the condition itself or from the effects thereof, there is no doubt that such problems as floods, ice floes, drought and water-borne diseases, to mention only a few, are of serious consequence for watercourse States. The present article is concerned with the prevention and mitigation of such conditions while article 27 deals with the obligations of watercourse States in responding to actual emergency situations. Of course, certain of the "conditions" to be prevented and mitigated under the present article, e.g. floods and ice floes, may in fact materialize in an "emergency" of the kind dealt with in article 27. But the measures called for in preventing and mitigating these conditions are of an anticipatory nature and are thus quite different from those involved in responding to emergencies.

(2) Like articles 22, 23 and 25, the present article requires that the measures in question be taken "individually or jointly". As in the case of those articles, this expression is an application of the general obligation of equitable participation set forth in article 6. The requirement that watercourse States take "all appropriate measures" means that they are to take measures that are tailored to the situation involved, and that are reasonable in view of the circumstances of the watercourse State in question. The obligation is thus that watercourse States exercise their best efforts to prevent and mitigate the conditions in question. It takes into account the

capabilities of watercourse States, in so far as their means of knowing of the conditions and their ability to take the necessary measures are concerned.

(3) The conditions dealt with in article 26 may result from natural causes, human conduct, or a combination of the two. 219/ The expression "natural causes or human conduct" comprehends each of these three possibilities. While States cannot prevent phenomena resulting entirely from natural causes, they can do much to prevent and mitigate harmful conditions that are consequent upon such phenomena. For example, floods may be prevented, or their severity mitigated, through the construction of reservoirs, afforestation, or improved range management practices. Such measures must be predicated upon as much data and information as possible concerning the hydrological and meteorological situation in the area in question.

(4) The list of conditions provided at the end of the article is non-exhaustive, but includes most of the major problems that the article is intended to address. Other conditions covered by the article include drainage problems and flow obstructions. Drought and desertification may not, at first glance, seem to fit in with the other problems mentioned since, unlike the others, they are the result of the lack of water rather than the harmful effects of it. But the effects of a drought, for example, may be seriously exacerbated by improper water management practices. 220/ And States situated in regions subject to droughts and desertification have demonstrated their determination to co-operate with a view to controlling and mitigating these problems. 221/ In view of the severity of these problems, and of the

---

219/ For example, floods and siltation may result from deforestation coupled with heavy rains. Or a flood may be caused by earthquake damage to a dam.

220/ See, e.g. Report of the United Nations Water Conference, supra, note 171, p. 112.

221/ See, e.g. article 4 of the 1980 Convention creating the Niger Basin Authority, which provides that the Authority shall undertake activities relating to the "[p]revention and control of drought and desertification ...". Natural Resources/Water Series No. 13, supra, note 161, pp. 58 and 59, article 4, para. (2) (c) (iv) and (d) (iv). See also the 1973 Convention establishing a Permanent Inter-State Committee on Drought Control in the Sahel, art. 4, subparas. (i) and (iv), document A/9178.

fact that co-operative action among watercourse States can do much to prevent or mitigate them, they are expressly mentioned in the article.

(5) The kinds of measures that may be taken under article 26 are many and varied. They range from the regular and timely exchange of data and information that would be of assistance in preventing and mitigating the conditions in question, to taking all reasonable steps to ensure that activities in the territory of a watercourse State are so conducted as not to cause conditions that may be harmful to other watercourse States. They may also include the holding of consultations concerning the planning and implementation of joint measures, whether or not involving the construction of works, and the preparation of studies of the efficacy of measures that have been taken.

(6) Article 26 is based upon the provisions of numerous treaties, 222/ decisions of international courts and tribunals, other evidence of State practice, and the work of international organizations. 223/ Representative examples of these authorities have been surveyed and analysed in the Fifth report of the Special Rapporteur. 224/

Article 27

Emergency situations

> 1. For the purposes of the present draft article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results

---

222/ See, e.g. the systematized collection of treaty provisions concerning floods in the report submitted in 1972 by the Committee on International Water Resources Law of the International Law Association. ILA, Report of the Fifty-fifth Conference, New York, 1972 (1974), Part II, Flood Control, pp. 43-97. A number of these agreements require consultation, notification, the exchange of data and information, the operation of warning systems, the preparation of surveys and studies, the planning and execution of flood control measures, and the operation and maintenance of works.

223/ See especially the articles on flood control adopted in 1972 by the International Law Association (*ibid*.).

224/ A/CN.4/421 and Add.1, paras. 2-116.

suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, as for example in the case of industrial accidents. */

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in co-operation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies in co-operation, where appropriate, with other potentially affected States and competent international organizations.

Commentary

(1) Article 27 deals with the obligations of watercourse States in responding to actual emergency situations that are related to international watercourse[s] [systems]. It is to be contrasted with article 26 which concerns the prevention and mitigation of conditions that may be harmful to watercourse States. 225/ Article 27 consists of four paragraphs, which may be reduced to three if the definition presently contained in paragraph 1 is moved to article 1.

(2) Paragraph 1 defines the term "emergency". The definition contains a number of important elements, and includes several examples that are provided for purposes of illustration. As defined, an "emergency" must cause, or imminently threaten, "serious harm" to watercourse States "or other States". The seriousness of the harm involved, together with the suddenness of the emergency's occurrence, justifies the measures required by the article. The expression "other States" refers to non-watercourse States that might be

---

*/ This paragraph which deals with the definition of emergency may be moved up to article 1 on [Use of terms].

225/ See paragraph (1) of the commentary to that article.

affected by an emergency. These would usually be coastal States that could be harmed by, e.g. a chemical spill transported by an international watercourse into the sea. The situation constituting an emergency must arise "suddenly". This does not necessarily mean, however, that the situation need be wholly unexpected. For example, weather patterns may provide an advance indication that a flood is likely. Because this situation would pose "an imminent threat of causing [] serious harm to watercourse States", a watercourse State in whose territory the flood is likely to originate would be obligated under paragraph 2 to notify other potentially affected States of the emergency. Finally, the situation may result either "from natural causes ... or from human conduct". While there may well be no liability on the part of a watercourse State for the harmful effects in another watercourse State of an emergency originating in the former and resulting entirely from natural causes, the obligations under paragraphs 2 and 3 would nonetheless apply to such an emergency. 226/

(3) Paragraph 2 requires a watercourse State within whose territory an emergency originates to notify, "without delay and by the most expeditious means available", other potentially affected States and competent international organizations. Similar obligations are contained, for example, in the 1986 Convention on early notification of a nuclear accident, 227/ the 1982 United Nations Convention on the Law of the Sea, 228/ and a number of agreements concerning international watercourses. 229/ The words "without

---

226/ Thus, the breach of one of those obligations would engage the responsibility of the State in question.

227/ International Legal Materials, vol. XXV (1986), p. 1370, article 2, p. 1371.

228/ Article 198.

229/ See, e.g. the 1976 Convention on the protection of the Rhine against chemical pollution between Canada and the United States, art. 11, supra, note 201, the 1978 Agreement on Great Lakes Water Quality, supra, note 163; and the 1977 Convention concerning accidental pollution of Lake Geneva, 1977 Official Collection of Swiss Laws, p. 2204, reproduced in Ruester, Simma and Bock, International Protection of the Environment, vol. XXV (1981), p. 285.

delay" mean immediately upon learning of the emergency, and the phrase "by the most expeditious means available" means that the most rapid means of communication that is accessible is to be utilized. The States to be notified are not confined to watercourse States since, as explained above, non-watercourse States may be affected by an emergency. The paragraph also calls for the notification of "competent international organizations". Such an organization would have to be competent to participate in responding to the emergency by virtue of its constituent instrument. Most frequently, such an organization would be one established by the watercourse States to deal, *inter alia*, with emergencies. 230/

(4) *Paragraph 3* requires that a watercourse State within whose territory an emergency originates "immediately take all practicable measures ... to prevent, mitigate and eliminate harmful effects of the emergency". The most effective action to counteract most emergencies resulting from human conduct is that taken where the industrial accident, vessel grounding or other incident occurs. But the paragraph requires only that all "practicable" measures be taken, meaning those that are feasible, workable and reasonable. Further, only such measures as are "necessitated by the circumstances" need be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States. Like paragraph 2, paragraph 3 foresees the possibility that there will be a competent international organization, such as a joint commission, with which the watercourse State may co-operate in taking the requisite measures. And finally, co-operation with potentially affected States (again including non-watercourse States) is also provided for. Such co-operation may be especially appropriate in the case of contiguous watercourses or where a potentially affected State is in a position to render assistance on the territory of the watercourse State where the emergency originated.

(5) *Paragraph 4* contains an obligation that is different in character from those contained in the two preceding paragraphs, in that it calls for

---

230/ See, e.g. article 11 of the Convention on the protection of the Rhine against chemical pollution, *supra*, note 201.

anticipatory rather than responsive action. The need for the development of contingency plans for responding to possible emergencies is now well recognized. For example, article 199 of the 1982 United Nations Convention on the Law of the Sea provides that "States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment".

(6) The obligation set forth in paragraph 4 is qualified by the words "when necessary", in recognition of the fact that the circumstances of some watercourse States and international watercourse[s] [systems] may not justify the effort and expense that are involved in the development of contingency plans. Whether such plans would be necessary would depend, for example, upon whether the characteristics of the natural environment of the watercourse, and the uses made of the watercourse and adjacent land areas, would indicate that it was possible for emergencies to arise. It is probable that with respect to most international watercourse[s] [systems] in the world today, the development of contingency plans would be advisable, if not strictly necessary, since they help to avoid unnecessary damage to property, health, the ecosystem of the watercourse, amenities, and the marine environment.

(7) While watercourse States bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in co-operation with "other potentially affected States and competent international organizations". For example, the establishment of effective warning systems may necessitate the involvement of other, non-watercourse States as well as international organizations with competence in that particular field. In addition, the co-ordination of response efforts might be most effectively handled by a competent international organization set up by the States concerned. In such cases, paragraph 4 requires that watercourse States co-operate with the other States and any international organization or organizations concerned.

D. Points on which comments are invited

313. The Commission would welcome the views of Governments either in the Sixth Committee of the General Assembly or in written form, in particular on the draft articles contained in annex I, Implementation of the draft articles, as proposed by the Special Rapporteur.

CHAPTER V

STATE RESPONSIBILITY

A. Introduction

314. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (*mise en oeuvre*) of international responsibility. 231/

315. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading *Part One of the draft articles*, concerning "the origin of international responsibility". 232/

316. The Commission, at its thirty-second session, also began the consideration of *Part Two of the draft articles* on "the content, forms and degrees of international responsibility".

317. The Commission, from its thirty-second to its thirty-eighth sessions in 1986, received seven reports from the Special Rapporteur, Mr. Willem Riphagen, 233/ with reference to Parts Two and Three of the draft articles. The seventh report contained a section (which was neither

---

231/ *Yearbook ... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

232/ *Yearbook ... 1980*, vol II (Part Two), pp. 26-63, document A/35/10, chap.III.

233/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

introduced nor discussed at the Commission) on preparation of the second reading of Part One of the draft articles, concerning the written comments of Governments on ten of the draft articles of Part One.

318. As of the conclusion of its thirty-eighth session in 1986, the Commission had provisionally adopted draft articles 1 to 5 of Part Two. 234/ Draft articles 6 to 16 of Part Two 235/ and draft articles 1 to 5 of Part Three 236/ and its Annex 236/ had been referred to the Drafting Committee. 237/

319. The Commission, at its thirty-ninth session in 1987, appointed Mr. Gaetano Arangio-Ruiz, Special Rapporteur for the topic of State responsibility. 238/ The Commission received two reports from the Special Rapporteur from 1988 to 1989. 239/ At its forty-first session in 1989, the Commission referred to the Drafting Committee draft articles 6 and 7 of Chapter Two (Legal consequences deriving from an international delict) of Part Two of the draft articles. 240/

234/ See section C below.

235/ For the text of draft articles 6 to 16 of Part Two, see *Yearbook ... 1985*, vol. II (Part Two), p. 20, note 66.

236/ For the text of draft articles 1 to 5 of Part Three and its Annex, see *Yearbook ... 1986*, vol II (Part Two), p. 35, note 86.

237/ For a full historical review of the Commission's work on the topic up to the thirty-seventh session held in 1985, see *Yearbook ... 1985*, vol. II (Part Two), p. 19. For developments as of 1985 see paras. 317 to 319 of this report.

238/ *Official Records of the General Assembly, Forty-second session, Supplement No. 10* (A/42/10), para. 220.

239/ Document A/CN.4/416 and Corr.1 (English only), Corr.2, and A/CN.4/416/Add.1 and Corr.1 (English only), Corr.2 and Corr.3 (Spanish only); document A/CN.4/425 and Corr.1 (English only) and A/CN.4/425/Add.1 and Corr.1 (English only).

240/ For the text of the articles, see Report of the International Law Commission on the work of its forty-first session (*Official Records of the General Assembly, Forty-fourth session, Supplement No.10* (A/44/10)), pp. 191-193, paras. 229 and 230.

B. Consideration of the topic at the present session

320. At the present session, the Commission considered the Special Rapporteur's second report (A/CN.4/425 and Corr. 1 (English only) and A/CN.4/425/Add.1 and Corr.1 (English only)) at its 2168th to 2175th and 2185th meetings.

321. The Commission at its 2185th meeting referred draft articles 8, 9 and 10 to the Drafting Committee.

1. General approach

322. The Special Rapporteur stated that his second report dealt with the substantive consequences arising from an internationally wrongful act (delict) other than cessation and naturalis restitutio dealt with in his first report. He had examined three further consequences: reparation by equivalent, satisfaction and guarantees of non-repetition. The report also dealt with the impact of fault, in a broad sense, on the forms and degrees of reparation.

323. Before entering into the more detailed discussion of remedies, it was important, the Special Rapporteur stated, to examine some issues of a general nature which affected his approach to the three articles he had introduced. One important issue in conceptualizing remedies was the kind of injury or damage for which each one of the possible remedies was provided.

324. The Special Rapporteur stated that compensation was generally described as covering the "material" injury suffered by the offended State. Satisfaction was generally indicated as covering instead the "moral" injury sustained by the offended State in its honour, dignity and prestige as well as its "subjective right". The two adjectives, "material" and "moral" failed however, to give an exact picture of the areas of injury respectively covered by compensation and satisfaction. On the one hand, pecuniary compensation, allegedly covering only the State's material damage, was intended also to compensate the moral damage suffered by the nationals of the offended State. Satisfaction, for its part, covered not the moral damage sustained by the State's nationals but only the moral damage caused to the honour, dignity, prestige and "subjective right", of the State (as an international person), such damage being qualified as moral damage of the injured State. Moral damage to nationals and moral damage to the State were thus to be distinguished.

325. As regards in particular moral damage to nationals, notwithstanding the lack of uniformity among legal systems, international law provided compensation for such damage suffered by the nationals of an injured State as an integral part of the principal damage suffered by that State. The Special Rapporteur cited one of the leading cases on this issue, the *Lusitania*, where the arbitrator concluded that both civil law and common law recognized injuries caused by invasion of private rights. 241/ The arbitrator had further concluded that international law provided compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social positions or injury to one's credit and reputation. For the arbitrator, these injuries were real and the mere fact that they were difficult to measure by money standards did not make them any less real and was not sufficient reason why the injured person should not be compensated. These damages, the arbitrator had further stated, were not a penalty. The Special Rapporteur stated that the *Lusitania* was not an exception and that other international tribunals had also granted compensation for moral injury. 242/ This moral injury to individuals (which may extend to the State's agents *qua* private persons) should be however separated from the moral damage to the State.

326. Some authors had characterized the latter type of injury, namely the moral damage to the State, as the infringement of a State's "subjective right"; 243/ and some had referred to it as political injury. 244/ It seemed to the Special Rapporteur that the term "political" was probably intended to

---

241/ United Nations, *Reports of International Arbitral Awards* (hereafter UNRIAA) vol. 7, p. 35.

242/ For example, *Chevreau*, *Gage*, *Di Caro*, *Maninat* and *Grimm*, in UNRIAA, vol. 2, p. 1139, vol. 9, p. 226, vol. 10, p. 598, vol. 10, p. 55; *Iran-U.S. Claims Tribunal Reports*, vol. 2, p. 78, respectively.

243/ Anzilotti, *Cours de droit international* (trans. Gidel), 1929, p. 493-94.

244/ Garcia Amador, Sixth report, doc. A/CN.4/134, paras. 31 and 92; Przetacznik, *La responsabilité internationale de l'Etat*, in *Revue générale de droit international public*, 1974, p.936.

stress the "public" nature acquired by moral damage when it affected more immediately the State in its sovereign quality and international personality. In the view of the Special Rapporteur, moral damage to the State consisted of (a) the infringement of the State's right *per se* and (b) the injury to the State's dignity, honour or prestige. He referred to the former as a "legal" or "juridical" injury, such injury deriving from *any* infringement of the offended State's "subjective right", regardless of the existence, of any other kind of damage. Both (a) and (b) should be understood as moral damage to the injured State.

327. The Special Rapporteur also explained that despite their distinction, and despite the fact that their reparation was achieved in principle (and frequently also in practice) by the distinct remedies of pecuniary compensation and satisfaction, the injured State's material and moral damage, as defined, were not infrequently confused in the award of remedies. In particular, the moral damage to the State may be "absorbed", so to speak, by pecuniary compensation, so that at first sight the specific remedy for the moral damage would seem to be hardly perceptible. However, a more careful examination of international jurisprudence and diplomatic practice revealed that the moral damage to the injured State had been given special reparation which could be classified as satisfaction.

328. As regards the distinction between "material" damage and "non-material" or "moral" damage, most members of the Commission agreed with the Special Rapporteur's general premise that damage suffered by a State or by individuals as a result of an internationally wrongful act could broadly be divided into those two categories. It was agreed that a State, in addition to financial losses, might also suffer damage in respect of its honour and dignity and that a remedy should be provided for the latter damage. The views differed, however, as to the content of material or moral injury, namely what types of injuries should be considered "material" or "moral" damage and hence covered by the articles. The views also differed as regards the forms of remedy that were most appropriate for these various types of damage. For example, while some members were not certain that "moral" damage to agents of a State was independent of the "moral" damage to the State itself, as the

READEX FICHE

Special Rapporteur had suggested, some others agreed with the Special Rapporteur on that issue. The analysis of views on various forms of damage as it relates to the forms of remedy is covered below under the sections dealing with articles 8, 9 and 10.

329. As regards the use of the expression "moral" damage, a few members preferred the expression "non-material" damage, which, in their view, more appropriately corresponded to the type of responsibility a State would incur, namely non-material and (according to some writers) political responsibility. The expression "non-material" damage, in their view, also avoided unnecessary theoretical discussions about whether a State as a collective entity was capable of having "moral" attitudes - attitudes which, in most legal systems, were attributed to human beings only.

330. The Special Rapporteur stated that in the area of primary rules, such as maritime delimitation, trade and economic relations, the uses of watercourses etc., conflicts of interest between groups of States (coastal and land-locked, poor and rich, upstream or downstream etc.) were clear and rather well-defined. In his view, that was not as much the case with secondary rules. Any State might any day be either an author State or an injured State. Therefore all States would draw, on balance, equal advantages and disadvantages from any rules adopted.

331. A few members did not agree with the Special Rapporteur's analysis that all States were on an equal footing in matters of remedy. While it was true that on legal grounds States were equal, factually States were not equal. There were States who were capital exporting and those who were capital importing; there were former administering States and former colonies; there were militarily powerful States and weaker States, etc. State practice upon which the Special Rapporteur had relied had grown also in the light of such factual inequalities between States. Thus, formulating abstract rules on reparation on the assumption that States had equal interests might lead to undesirable consequences.

332. The Special Rapporteur stressed in his reply that he had not intended to deny the existence of differences between States due to historical, economic and other factors. He had only meant that the conflicts of interest due to

such differences did not affect the choice of secondary rules as much - and as directly - as they surely affected choices with regard to primary rules; and equity, which in his view played an implied role in the application of any rule, could surely be invoked in favour of a poor injured or responsible State more than in favour of a rich one. It was also his belief that it was mainly in the area of the primary rules that the vital needs and concerns of the developing countries should be taken into fuller account than had been done so far by the developed world. Another matter was of course the problem of taking account of inequality of might when dealing with countermeasures. With regard to the latter it would be indispensable to avoid formulating any rules which might favour the strong and the rich.

333. A number of further comments of a general nature were made, in the Commission, which related to the overall approach of the Special Rapporteur to remedies and the methodology he had followed in his second report.

334. In the view of some members, the Special Rapporteur had made, perhaps unnecessarily, a rigid distinction between various remedies. According to those members, satisfaction and pecuniary compensation were just two forms of reparation by equivalent, both intended to wipe out the consequences of a wrongful act when restitution in kind was impossible or inadequate. Compensation corresponded to the pecuniary form of reparation by equivalent and satisfaction to the other forms of non-pecuniary reparation.

335. While not questioning the ultimate functional unity of reparation in a broad sense, all the various forms of which contained a compensatory as well as retributive element, the Special Rapporteur believed that satisfaction occupied a particular place and performed a distinct function within the general framework of reparation. This was proved, in his view, by a very rich and varied practice of States, including the very recent award of the arbitral tribunal in the *Rainbow Warrior* Case of 30 April 1990.

336. In the view of some other members, the Special Rapporteur had approached remedies primarily from the point of view of injuries to aliens in cases of torts. Most of the judicial and arbitral decisions, upon which he seemed to have relied dealt with alleged damage to property, bodily harm or loss of life affecting aliens. The report did not contain much material on different

situations, for example cases of violation of a general rule of international law pertaining to the environment, international trade or treaty obligations. It was, in the view of these members, unclear, under the approach adopted, what consequences would emerge in cases of violation, for example, of a disarmament treaty. Would the so-called injured State, in addition to the right to suspend or terminate the treaty, have a right to pecuniary compensation as well? The problem with too much reliance on torts cases was that those cases involved real interferences with property, rights or interest of the injured party. However, in most treaty violations, one confronted interferences with the "expectations" of the so-called injured State. These members were not certain how the Special Rapporteur's approach, namely that the injured party should be put in as good a position as it would have been if the wrongful act had not occurred, would apply to cases other than torts. It was noted that in State practice under GATT, which protected economic rights and thereby created economic expectations, violations of the treaty did not seem to lead to pecuniary compensation. Also, in case of damage caused in armed conflicts, State practice did not support the presumption that the State which began the armed conflict should pay all the costs for reconstruction. In the view of these members, these matters were not sufficiently explored by the Special Rapporteur, and hence limited his approach to remedies.

337. Commenting on these remarks, the Special Rapporteur stressed that while he still maintained that many of the rules on reparation were developed through the practice concerning injuries to nationals and their property, he had not relied solely on that practice. With regard to both pecuniary compensation and satisfaction, he had also taken into account practice in other areas. As regards in particular the "expectations" mentioned by one member, he was not sure that those were matters necessarily to be covered by the general rules presently under discussion. As for the consequences of a violation of a disarmament treaty, it was among the matters he would cover in his third report, which dealt with countermeasures and the conditions under which they could be resorted to. Concerning finally the hypothesis of post-war settlements, he thought that equity and reasonableness would not fail to have a bearing in avoiding the total disruption of a defeated State's

economy. One should not go so far in leniency, however, as practically to condone an act of aggression. Again this was a matter to be dealt with in connection with the crimes of article 19 of Part One.

338. As regards the material cited by the Special Rapporteur, two points were raised: one regarding the citation of old arbitral awards and the other regarding reliance on diplomatic practice. In respect of the former, some members felt that the report of the Special Rapporteur had covered too many old cases and instead should have relied on newer materials. Many of the decisions of older cases, particularly of the late nineteenth or early twentieth century, were given during colonial practice and they no longer represented contemporary international law. The Boxer revolt 245/ was mentioned as a case which should not be invoked as precedent. On that issue, some other members believed that it was important to rigorously examine past State practice. States' behaviour in the past and consequences derived from it were essential in formulating rules governing the future. This did not mean, in their view, that all past State practice was indiscriminately relevant but it provided a clearer picture and guided those who were in a position to make a decision. Even the worst cases such as the Boxer revolt 246/ could be used as a warning signal so as not to repeat the same mistake. In the final analysis, it was stated, what was important was whether a particular rule, regardless of its origin, was part of contemporary international law and whether it was generally accepted by States.

339. As regards the second point, namely too much reliance on diplomatic practice, a few members felt that in diplomatic practice many political factors usually played an important role and that those factors could not be easily pinpointed. Hence, legal principles might not have always been relied upon to resolve disputes of this nature at the diplomatic levels. That, in their view, somewhat reduced the value of such practice as sole evidence of international law.

245/ C. Eagleton, The Responsibility of States in International Law (1928), p. 185.

246/ Ibid.

340. With regard to the old character of the practice analysed, the Special Rapporteur stated that not all the cases cited were referred to as precedents. A number of them had been cited precisely in order to condemn, in the most unambiguous terms, practices of colonialist and imperialist States (notably Western States), incompatible with sovereign equality, and to justify the last paragraph of draft article 10.

341. As regards reliance on diplomatic practice, the Special Rapporteur stated that it was precisely through diplomatic practice that general international ("customary" or "unwritten") law developed. The analysis of diplomatic practice was particularly essential in view of the relative scarcity of international jurisprudence, a scarcity due to the tendency not to resort to arbitration as frequently as desirable.

342. It was also pointed out that any approach to remedies should include the possibility of enhancing the peaceful settlement of disputes between States. There had been many cases in which States had resolved questions of remedies peacefully among themselves and, without accepting the responsibility, had provided for compensation. These types of settlement, rather typical of those after the Second World War, were made through lump-sum agreements, ex gratia payments and other types of political settlement. It might be useful to include an article in the draft expressly stipulating that the forms of reparation provided in the articles should apply without prejudice to any other form of settlement based on an agreement between the parties.

343. With regard to the points covered by the preceding paragraph, the Special Rapporteur explained that the subject matter of the report under discussion did not include any provision directly or indirectly concerning peaceful settlement procedures. References to such procedures would be made in his third report on reprisals; settlement procedures to be further covered in Part Three. As regards long-term agreements and ex gratia settlements, there was nothing in the draft articles proposed which could represent an obstacle thereto.

2. Specific articles

Article 8. Reparation by equivalent [247]

344. The Special Rapporteur stated that the concept of reparation by equivalent was governed by the well-known principle that the result of reparation in a broad sense should be the wiping out, to use the *Chorzów Factory* case dictum, of all the legal and material consequences of the

---

[247] Article 8, as proposed by the Special Rapporteur, read as follows:

"Article 8. Reparation by equivalent

1. Alternative (a) The injured State is entitled to claim from the State which has committed an internationally wrongful act pecuniary compensation for any damage not covered by restitution in kind, in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed.

Alternative (b) If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind in accordance with the provisions of the preceding Article, the injured State has the right to claim from the State which committed the wrongful act pecuniary compensation in the measure necessary to make good any damage not covered by restitution in kind.

2. Pecuniary compensation under the present Article shall cover any economically assessable damage of the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals.

3. Compensation under the present Article, includes any profits the loss of which derives from the internationally wrongful act.

4. For the purposes of the present Article damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.

5. Whenever the damage in question is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly."

unlawful act in such a manner as to re-establish, in favour of the injured party, the situation that would exist if the wrongful act had not been committed 248/. In view of the incompleteness that frequently characterized restitution in kind, it was obviously through pecuniary compensation that the principle could eventually be effectively applied. Reparation by equivalent was qualified by three features that distinguished it from other forms of reparation. The first was that it could be used to compensate for damage which could be evaluated in economic terms, including moral damage to nationals. The second was that, although some measure of retribution was to be found in any form of reparation, reparation by equivalent performed by nature an essentially and predominently compensatory function. The third was that the objective of reparation by equivalent was to compensate for all the economically assessable damage caused by the internationally wrongful act, but only such damage. Indications to that effect were to be found in the relevant literature and in case law, such as the *Lusitania* 249/ and *Portuguese Colonies* 250/ cases. He mentioned a number of issues related to pecuniary compensation that should be examined. They included: the compensatory function of reparation by equivalent and "punitive damages"; whether such form of reparation should also be granted for "moral" damage; indemnification of "indirect" as well as "direct" damage; the effect of multiplicity of causes on this form of reparation; the effect of the injured State's conduct on reparation; and the question of *lucrum cessans* as distinguished from *damnum emergens*.

345. The Special Rapporteur was aware that the standards of indemnification in international law did not present the high degree of uniformity that would be desirable. But this did not mean, in his view, that there were no general principles to be determined in international law of sufficient clarity for

---

248/ PCIJ, Ser. A, No. 17, 1928, p. 47.

249/ *Supra*, note 241.

250/ UNRIAA, vol. 2, p. 1032.

application or codification. He further believed, on the other hand, that considering the nature of the topic it would be impossible and indeed undesirable to identify or develop rigid and detailed rules susceptible of mechanical application to every conceivable breach. Many of the principles regarding pecuniary compensation, even though they were originally modelled on municipal principles, had now become rules of international law. These rules did more than provide just general guidance, as some authors suggested. They provided sufficient ground for their codification. Besides, it was within the function of the Commission to fill the gaps, where more detailed rules were necessary and conceivable, by progressively developing the law. In the field of international responsibility, more than any other, the Commission was not entrusted with the task of codification alone. Whenever the study of doctrine and practice indicated a lack of clarity, uncertainty or a "gap" in existing law, the Commission should not necessarily declare a non liquet. An effort should be made to examine the issue de lege ferenda and find out whether the uncertainty might be removed or the gap filled by developing the law. The Special Rapporteur stated that, taking into account State practice and the purpose of reparation by equivalent, he proposed two drafting alternatives for paragraph 1 which indeed defined the general scope of pecuniary compensation.

346. It was generally agreed in the Commission that the dictum of the Permanent Court of International Justice in the Chorzów Factory [251] case, namely that reparation was to wipe out all the consequences of the wrongful act and that the damages should be awarded for loss sustained which would not be covered by restitution in kind, should be the point of departure in formulating the articles on remedy. This common ground indicated that there was a certain interdependence between the various forms of remedies. The difficulty some members found with article 8 was that its relationship with article 7 on restitution in kind, which was now before the Drafting Committee, was not brought out clearly. It was recalled that article 7 did not define the content of restitution, and article 8, as proposed, relied on such a

---

[251] Supra, note 248.

definition, which was not there. As a result, the scope of article 8 became unclear. The two alternatives for paragraph 1 of the article did not clarify the situation. Alternative (a) simply spoke of "any damage not covered by restitution", without giving any explanation about the meaning of that phrase. Alternative (b) appeared to give a definition of restitution in kind that was based on the establishment of a theoretical or hypothetical situation which would have existed if the breach had not occurred. Such a broad definition of restitution in kind necessarily covered the whole range of reparation and always comprised a certain amount of pecuniary compensation. The ambiguity in article 8 would therefore create confusion. Even the title of the article was misleading, since the award of damages, the subject of article 8, was based on the assumption that damage could not be restored by the return of the object that was damaged or its equivalent. Indeed, if an equivalent of the damaged object could be offered, that would constitute restitution. What article 8 covered was basically pecuniary compensation and it should therefore be entitled as such.

347. The Special Rapporteur explained that alternatives (a) and (b) of paragraph 1 of article 8 were only meant, as a number of speakers had noted, for the Drafting Committee to choose. As regards the relationship between article 8, paragraph 1, and article 7, he believed that since the combined effect of the two provisions would be the re-establishment of the situation that would exist if the unlawful act had not been committed - and since naturalis restitutio could hardly be expected to achieve that result by itself, it was really not necessary to take in the text an explicit stand between the broad and the narrow definition of restitutio. However, while he had thought it to be indispensable to go beyond the formulation of draft article 6 as proposed in 1985, he would be reluctant to suggest that the Commission now go too far in an opposite direction. As regards the title of article 8, he agreed that "pecuniary compensation" would be preferable. This title would also meet the point made by one member that reparation by equivalent might in certain cases, according to Islamic private law, represent a form of naturalis restitutio rather than compensation - this in the case of "restitution" of an object of the same kind as the "lost" original.

348. As regards the question of how much the article on pecuniary compensation should be influenced by progressive development of international law, two general views were expressed. One view supported the idea of developing the law through the exercise of progressive development, particularly in view of the fact that much of the law in that area was influenced by municipal law and should therefore be thoroughly examined and that States had an interest in modifying and developing the law further. However, noting the comment by the Special Rapporteur to the effect that the actual payment of pecuniary compensation depended on the assessment of facts of a particular case, it was unclear to these members what matters were appropriate for development. The other view, however, urged caution in developing rules on the payment of compensation beyond what was already done in the *Chorzów Factory* [252] case. The problem the supporters of this view saw was that, in such development, the Commission would more likely look into municipal law of torts, a concept basically developed in the Western industrial States and not properly developed in all developing States. Such a development might therefore run counter to the interests of developing countries which formed the majority of States. This view was not also in favour of detailed rules on pecuniary compensation and in particular on the size of such compensation. They preferred a flexible approach.

349. The Special Rapporteur reiterated his belief in the need to take into full consideration the position of developing States also in codifying the law of State responsibility, as in any other relevant area of international law. He had already explained in what sense he believed that a difference did exist in that respect between different kinds of rules (for example primary rules and secondary rules, rules on reparation and rules on countermeasure). He also explained in what sense equity and reasonableness could be used by arbitrators in order to adapt the general rules to the circumstances of each case.

---

[252] *Supra*, note 248.

350. As regards paragraph 1, some members felt that it did not seem to have fully taken into account the definition of injured State in article 5 of Part Two already adopted. According to that article, there might be many injured States, but not all of them could have the right to financial compensation. A practical difficulty, they felt, would arise, for example, where a person had suffered damage as a result of a violation of a human rights treaty. Every other State party was deemed to have been injured. But to what State could the economically assessable damage be imputed? If it was maintained that the damage caused to a national of a State was always damage to the State itself, the right to claim compensation would be denied because it was normally the home State which violated the rights of its own national.

351. Similarly, in case of damage to the environment, there might be cases where there would be several injured States entailed to claim cessation and restitution. Very often, however, only one or two States might actually have suffered harm not covered by restitution and could claim pecuniary compensation. The situation of these injured States did not seem to be quite clear under this paragraph.

352. As regards the remark concerning the relationship of paragraph 1 of article 8 with the definition of injured State, the Special Rapporteur stated that paragraph 1 of article 8 should be read in conjunction with paragraph 1 of article 10. According to the draft articles, whenever no material damage could be identified to the detriment of any one or more injured State, paragraph 1 of article 10 should apply. That provision covered both the case where no material damage had been sustained - or the case of human rights violations by another State to the detriment of its own nationals - and the case where the wrongful act affected a number of injured States in different ways. The latter might be the case with violations of rules on the environment. This was precisely the reason why, given the broad concept he had adopted for moral damage to the State (covering also the legal injury involved in the infringement of any "subjective" right), the reference to moral and legal injury in paragraph 1 of article 10 was, in his view indispensable.

353. Paragraph 1, in the view of a few members, did not seem to take into account the time factor, namely the time when damage should be assessed; for example whether the assessment of damage at the time an agreement had been reached by the parties for pecuniary compensation was final. If that was the case, the question arose how that understanding could be reconciled with the proposition that damages should be awarded to restore the situation if the wrongful act had not been committed, since in the time period between the agreement and the actual implementation of the agreement, the damage might be aggravated. It was also suggested that a provision on the statute of limitations should be formulated to indicate a time limit within which a claim for pecuniary compensation could be made. Otherwise claims might be made indefinitely.

354. The Special Rapporteur pointed out that, much as he appreciated the importance of the issue of the time element raised by a few members, this matter should not be covered by article 8. Any such issues, as well as those concerning the statute of limitations, should be left to the general rules eventually to be codified in Part Three.

355. As regards the two alternatives proposed for paragraph 1, some members preferred alternative (a). For them, alternative (a), with all its ambiguity, provided a more viable approach to pecuniary compensation and it was more efficiently drafted. Some other members preferred alternative (b) because it dealt with what pecuniary compensation was about, namely "making good" any damage not covered by restitution in kind. A few members saw no substantial difference between the two versions, while one member could not support either version and preferred a text which made clear that, within the claim for reparation, pecuniary compensation could be claimed to the extent that reparation could not be made or had not been made by restitution.

356. Many members found the structure of paragraph 1 in both versions inappropriate and preferred that the paragraph be formulated with explicit reference to the obligation of the wrongdoer State to pay pecuniary compensation. Some members also made drafting suggestions.

357. With respect to the alternative formulations of paragraph 1 of article 8, the Special Rapporteur was able to confirm the view of the members who had found them equivalent in substance. In reply to the members who had made

drafting suggestions, he stated that was open to drafting improvements. This included the question of whether the draft articles would be better formulated in terms of rights of the aggrieved State or of obligations of the offending State.

358. Paragraph 2, the Special Rapporteur stated, specified the type of damage for which reparation by equivalent should be made. In his view, when one began with the premise that all the damage and only the damage caused by a wrongful act must be indemnified, there would be no reason to make a distinction between direct and indirect damage. In doctrine, he stated, an attempt was made to make such a distinction. Jurisprudence seemed to suggest that the concept of indirect injury was generally used to justify not awarding damages. However, no clear indications were given about the relationship between an event and damage that would justify its identification as indirect. As for a demarcation line over and above which injuries are indemnifiable, the Special Rapporteur referred to the War Risk Insurance Premium Claims case of 1923, where the tribunal stated that it did not matter whether the loss was indirect or direct, so long as there was a clear and unbroken connection between a wrongful act and the loss complained of. 253/ Accordingly, in the Special Rapporteur's view, pecuniary compensation must cover both the so-called direct damage to the State, such as that caused to its territory, its organization in a broad sense, its property at home and abroad, its military installations, its diplomatic premises, ships, aircraft and spacecraft, and the so-called indirect damage to the State, such as that caused through the person, natural or legal, of its nationals or agents. Within the latter context, the Special Rapporteur drew a distinction between patrimonial and personal damage. Personal damage included physical and moral damage to persons, and involved such injuries as unjustified detention or any other restriction on freedom, torture or other physical injury to the person, and death. In international case law and State practice, injuries of that kind were treated, in so far as they were capable of economic assessment,

---

253/ UNRIAA, vol. 7, p. 29.

according to the rules and principles that applied to pecuniary compensation for material damage to the State. As for patrimonial damage, it had always been an area in which pecuniary compensation had found its most natural scope, and it was in connection with such damage that the principles, rules and standards for the application of the remedy of pecuniary compensation had principally been developed by judicial decisions and diplomatic practice. It was mainly in relation to patrimonial injuries that judicial decisions and diplomatic practice had had recourse to distinctions and categories typical of private law - whether civil or common - and had adapted them to the peculiar features of international responsibility.

359. Two issues in particular, in paragraph 2, generated discussion. They were the expressions "economically assessable damage" and "moral damage". With respect to "economically assessable damage", some members felt that the phrase was not entirely clear and did not serve as guidance to arbitrators who had to make such determinations because it simply stated the obvious, namely that, in order to be compensated in pecuniary terms, damage had to be capable of being assessed in economic terms. For some other members, the expression "economically assessable damage" was not so ambiguous. In many instances, in assessing damages, they believed international tribunals had been guided by municipal legal systems. Under those systems, damage was assessed, in the case of property, on the basis of the market value at the time of the damage or loss, or, if that was not possible, on the basis of the intrinsic value and, in the case of personal injury, on the basis of the age and family and financial position of the injured person or the person killed. Presumably, that was the sense in which "economically assessable damage" was used. On the other hand, it was true that international tribunals used such indices merely as signposts to facilitate assessment of the loss and that much depended on the individual facts of the case. Jurisprudence in the matter varied from State to State. That did not, however, vitiate the principle, the statement of which was an acknowledgement of current practice.

360. For yet some other members, the expression "economically assessable damage" was much too subjective. It depended on the philosophical approach and created controversial interpretations. The term was neither explained in the report nor made clear in the article itself. No indication was given

whether it excluded moral damage of the State itself or included costs of preventive measures or economic losses actually sustained as a direct result of such measures. Obviously, the term did not refer to quantifiable economic losses alone. But was it sufficient for a loss to be economically quantifiable in order for it to be regarded as economically assessable damage? Or did the loss have to have been actually sustained? Such questions took on particular importance in environmental law and most likely there had not yet been any arbitral decisions on them. The question of what could or should be understood by the term "economically assessable damage" gave rise to many complex issues, many of them of a contemporary nature, which the paragraph failed to elucidate.

361. A few members also felt that in the final analysis what mattered was that compensation should be adequate. This was, in their view, particularly relevant in cases of nationalization. That meant that the financial status of the offending State, in such cases, should also be taken into account. This approach was consistent with the concept of "excessive onerousness" which was introduced in article 7 on restitution in kind, but not in article 8 on reparation by equivalent. They saw no reason why that concept should be absent from article 8.

362. Considering the different views expressed - some members finding "economically assessable" unsatisfactory and other members finding it acceptable - the Special Rapporteur was ready to give the question of terminology some further thought. He submitted, however, that it would not be easy to find a better expression to indicate the criterion to be followed in determining the amount of pecuniary compensation. Any other criterion was bound to appear either too general or too specific. The necessary latitude was left by the chosen criterion to arbitrators and to the parties. In his view, equity was an implicit element of any rule or decision; and the same applied to reasonableness. An express reference to earlier elements might distort the general principle expressed in the Chorzów Factory 254/ case which had met, it seemed, a very wide acceptance in the Commission. Equity and

---

254/ *Supra*, note 248.

reason could not lead naturally any arbitrator to take due account of the circumstances of the case: among those, the respective economic and political conditions of the parties in the case. As regards finally the suggestion that one extend to pecuniary compensation the "excessive onerousness" limitation proposed for restitution in kind, the Special Rapporteur explained that that limitation was envisaged in article 7 only in a relative sense. It was used notably in connection with the relationship between naturalis restitutio, on the one side; and pecuniary compensation, on the other side; and allowed the offending State to revert to pecuniary compensation from naturalis restitutio in case the latter proved to represent an excessive burden.

363. The second issue on which many comments were made was pecuniary compensation for "moral damage". Some members were not convinced by the Special Rapporteur's analysis. They felt there was no uniformity in compensation awarded by arbitral tribunals for unlawful arrest or imprisonment and for grief and indignity and that it was overoptimistic to believe, as did the Special Rapporteur in his report, that relatively uniform solutions could be assumed to exist. It was also felt by some members that the Special Rapporteur had perhaps relied too much on fragmented municipal decisions and had generalized them. The absence of such uniform rules, these members felt, did not of course prevent the Commission from establishing such standards if it deemed it possible, necessary or wise to do so. They, however, did not feel it was appropriate to do so and preferred the deletion of "moral damage" from paragraph 2.

364. Some other members did not dispute the possibility of awarding compensation for "moral damage". They thought that on theoretical grounds "moral damage" did not belong in paragraph 2 on pecuniary compensation since it could not be economically assessed. They agreed that the tendency of judges and arbitrators was more often to try to assess non-patrimonial damage in terms of its economic or material aspects or consequences, which could serve as a basis for calculating compensation, such as in the Corfu Channel and in the Lusitania cases. They agreed that in instances of death or physical injury, as in cases of detention, etc., it was relatively easy to assess, in pecuniary terms, the damage to be compensated. But they found it practically impossible to do so in cases of mental suffering, such as

humiliation, shame or degradation. They did not intend to imply that, in such cases, the injured person should not claim satisfaction, but treating such satisfaction as reparation by equivalent was not true to the principle that reparation by equivalent was of an exclusively compensatory nature. For that reason, they felt that the reference to "moral damage sustained by the injured State's nationals" should be transferred to article 10 on satisfaction which referred to the possibility of "nominal or punitive damages". It was also pointed out that even though not all municipal law granted pecuniary compensation for moral damage to individuals, the arbitrators of international tribunals often took account of such mental suffering in their calculation of compensation.

365. On the question of moral damage to private parties, the Special Rapporteur felt that the Commission should not neglect this important element of State responsibility, an element closely connected with the respect for human rights. As regards the difficulty - but surely not an impossibility - of assessing moral damage in monetary terms, he did not believe it should represent an obstacle to the inclusion of moral damage to human beings in article 10. As explained in the report, this would not be an appropriate object for satisfaction: a remedy which was only appropriate for moral/legal injury to the State.

366. With respect to paragraph 3, the Special Rapporteur explained that in the context of patrimonial damage, namely damage to property, authors generally seemed to agree that compensation should not only be paid for the value of the damaged property itself (*damnum emergens*), but also for the loss of profit that could have been derived from that property (*lucrum cessans*). In State practice, however, while the compensation for the former damage had not posed any difficulty, for the latter, at times, problems had arisen and required special attention. He mentioned two problems which related to *lucrum cessans*: one related to the distinction between direct and indirect injury, namely in connection with what lost profits compensation should be paid, and the other to the extent to which profits should be compensated, particularly in respect of damage to property rights on a "going concern" of an industrial or commercial nature. As regards the former, he mentioned that

in at least two cases 255/ the tribunals had denied profits on the grounds that they were uncertain, not immediate or indirect. In literature, however, a clear distinction had been made between indirect damage and profit; and profit was found to be a legitimate component of pecuniary compensation. For profit to be compensable, the doctrine seemed to support the view that it was not necessary for the judge to determine with certainty that this damage (*lucrum cessans*) arose out of the wrongful act. It was sufficient if it could be presumed that, in the ordinary and normal course of events, the identified loss (*lucrum cessans*) would not have occurred if the unlawful act had not occurred. The Special Rapporteur cited a number of cases which had supported this conclusion. 256/ As regards the method of calculating *lucrum cessans*, he mentioned two: "*in abstracto*" and "*in concreto*". The former, a more commonly used method, consisted in calculating interest on the amounts due by way of compensation for the principal damage. Under this method, either a larger amount of pecuniary compensation which included profits were granted in a lump-sum, or profits were calculated on the basis of the profits earned by the same physical or juridical person in the period preceding the unlawful act, or earned during the same period by similar business concerns. The latter "*in concreto*" method was used, depending upon the circumstances of the case, to calculate profits which the injured enterprise or property would have made in the period in question. This method involved complicated formulas for computation.

367. As regards the calculation of profit involving reparation due for the unlawful taking of foreign property of a going concern of a commercial or industrial nature, the Special Rapporteur felt that State practice in that respect should not be ignored. He explained that a review of State practice

---

255/ *Canada* case, in Lapradelle-Politis, *Recueil des arbitrages internationaux*, 1954-7, vol. VII, p. 635, and *Lacaze* case, *ibid*., p. 298.

256/ *Cape Horn Pigeon*, UNRIAA, vol. 9, p. 65; *Delagoa Bay*, La Fontaine, *Pasicrisie Internationale*, 1902, p. 402; *William Lee*, Moore, *History and Digest of International Arbitrations to which the United States has been a party*, p. 3495 and *Chorzów Factory*, PCIJ, Series A, No. 17, p. 28.

seemed to indicate that the trend in unlawful taking had been to calculate profits which would approximate the complete wiping out of the damage caused by the wrongful act. In Aminoil v. Kuwait, where expropriation was considered lawful in connection with lost profits, the tribunal found that the Discounted Cash Flow (DCF), a method unsuitable for the calculation of lost profits in a lawful taking, might be adequate in a case of unlawful expropriation. 257/ This approach reflected the understanding that the application of such a method would ensure, in case of a wrongful taking, compensation more likely to restore the situation that would have existed if the wrongful act had not been committed. The Special Rapporteur deemed it indispensable to stress, however, that all this applied to unlawful takings of foreign property. It did not prejudge the solution in cases of lawful nationalization.

368. With respect to paragraph 3, many members, while admiring the analysis of abundant materials by the Special Rapporteur in his report, did not feel that those analyses were fully reflected in the proposed text. Some members agreed with the Special Rapporteur that an answer to what was compensable lost profits was found in two presumptions: that of the existence of profits, and that of a causal link with the wrongful act. But they found the reference to "any" profits the loss of which derived from the internationally wrongful act much too broad. Such a reference, they felt, encompassed all possible profits without any qualification, whereas care should be taken to cover only the lost profits which could be clearly defined and were more than a mere possibility or a hope or speculative profits. In connection with damage caused by pollution, it had often been held that the loss of profit had to be a direct result of the pollution or at least that the loss should have been foreseeable. They wondered why the Special Rapporteur had not introduced into the text of the draft article any of the qualifications discussed in paragraphs 65 to 76 of his report. One member cautioned against taking a narrow approach to lost profits in terms of only limiting it to the property of private individuals. In his view, some contemporary practice unrelated to property of private

---

257/ International Legal Materials, vol. XXI, p. 1031.

individuals was of particular relevance. He referred to the decision of the International Court of Justice on the merits in the case Military and Paramilitary Activities in and against Nicaragua. 258/

369. As regards the reference to pollution in general and the international transport of oil in particular, the Special Rapporteur stated that paragraph 3 only covered unlawful acts; and it only set forth a general rule, surely subject to derogation by special conventions such as those concerning oil transport. As regards in particular the injured parties, he had not intended to exclude damage to the State itself: on the contrary, damage to the State, actually the most important aspect of the matter, absorbed any damage (patrimonial or personal, including moral) to private parties.

370. As regards the assessment of lost profits, it was felt that most of the methods discussed in the Special Rapporteur's report had been taken from nationalization cases and did not result in any clear-cut measurement. Perhaps less weight, they thought, should be given to the methods used in nationalization cases and more attention paid to treaty regulations such as, for example, on international transport of oil and on pollution. In any case, not all lost profits had to be compensated - only such profit, as the Special Rapporteur stated in paragraph 65 of his report, as was "normal and foreseeable" and "in all probability would have been obtained" if the wrongful act had not been committed. A suggestion was made that it would be sufficient to state in paragraph 3 that compensation for lost profits should be reasonable and equitable.

371. As regards the causal link between a wrongful act and injury, covered by paragraph 4, the Special Rapporteur proposed the criterion of a "clear" and "unbroken" causal link between the two. These two criteria and not the "directness" of the damage, he felt, should determine whether the damage was indemnifiable. He referred to literature in support of that view. He also explained that references had been made to the "normality" and "predictability" criteria; meaning that an injury was properly linked to a wrongful act when the normal and natural course of events would indicate that the injury was a

---

258/ ICJ Reports, 1986, p. 149, paras. 13 and 14.

logical consequence of the act or when the author of the wrongful act could have foreseen the damage he would cause. The Special Rapporteur referred to the award in the Portuguese Colonies case, where Germany was held responsible for the injuries caused to Portugal because of the revolt of the indigenous population in Portuguese colonies. It was alleged that the revolt had been triggered by German invasion and Germany was held responsible for all the damage it could have anticipated. On the contrary, damages were not awarded for injuries that could not have been foreseen. 259/ The decision in Samoan Claims 260/ also used the predictability criterion. The Special Rapporteur noted that in State practice references were also made to "proximity", such as, for example, in the claim by Canada following the disintegration of the Cosmos 954, the Soviet nuclear satellite, a criterion notwithout ambiguity. Against this background, the Special Rapporteur stated that he believed that the causal link criteria should be determined in the following manner: (a) damages should be fully paid in respect of injuries that were caused immediately and exclusively by the wrongful act; and (b) damages must be fully paid in respect of injuries for which the wrongful act was the exclusive cause even though they might be linked to that act not by an immediate relationship but by a series of events each exclusively linked with the other by a cause and effect relationship.

372. Some members of the Commission agreed with the Special Rapporteur's analysis in the report but did not find it was adequately reflected in the formulation of the paragraph itself. In particular, they expressed doubts about the concept of "uninterrupted causal link", however long, which could result in virtually unlimited liability for the State and seemed much broader than the concept developed by the Special Rapporteur. In that context, it was suggested that, in cases of international delicts, the general interest was to limit the scope of consequences that would be covered by damages. In order to avoid a causal link growing to infinity, decisions of arbitral tribunals and

---

259/ UNRIAA, vol. 2, pp. 1032-33.

260/ Ibid., vol. 9, p. 15.

scholars usually spoke of "proximate cause", "adequate causality", "ordinary course of events" or stated that "the cause must not be too remote or speculative" or that there must be "a sufficiently direct causal relationship". The term "foreseeability" was also used to describe a causal relationship which was considered to be normal. That was the meaning of "*proxima causa*", a well- established term which was more precise and acceptable than the reference to an "uninterrupted causal link". The question was whether, from the course of events, a court could have clear and convincing evidence, language used in the *Trail Smelter* 261/ case. Therefore, it seemed to be against the practice to rely without any limitation on an uninterrupted chain of events, however long. Most legal systems, and many arbitral decisions, relied on "proximate causation".

373. Some other members also expressed reservations about the "uninterrupted causal link" formula but on another ground. They felt that a distinction must be made between causal link in the natural sciences and the causal link in the social sciences. In the former, one could perhaps rely entirely with certainty on the uninterrupted causal link formula because of the way in which natural elements operated and reacted. In social sciences, however, one always had to deal with human beings and their psychology which motivated their behaviour. Therefore the uninterrupted causal link in paragraph 4 should be qualified by other criteria such as "proximity", "foreseeability", etc. Besides, it was mentioned that the issue of causality could not be a simple question of fact; there had to be some policy-based control over the responsibility of the offended State. One member, on the other hand, preferred to draft the paragraph in a flexible manner, and leave the content of the rule to be developed in practice.

374. The Special Rapporteur stated that while believing, together with some of the members, that the expression used in paragraph 4 was an adequate general indication for arbitrators to settle the various cases on their specific

---

261/ UNRIAA, vol. 3, p. 1905.

merits, he was ready to explore other possibilities. He felt, however, that the best answer might be an adequate explanation of the expression in the commentary.

375. As regards the causal link and concomitant cause, the subject of paragraph 5, the Special Rapporteur stated that there might be circumstances in which injury was not caused exclusively by an unlawful act, but also by acts of third parties or the conduct of the injured State itself. In such cases the wrongdoer State should not be held responsible for full damage. Partial damages in proportion to the amount of injury attributable to the wrongful act would be awarded. This approach, the Special Rapporteur stated, was supported by State practice.

376. Many members of the Commission generally accepted the thrust of paragraph 5. Their views, however, differed as to whether that paragraph should remain as part of article 8 or be drafted as a separate article. Those who supported a separate article on concomitant causes did so on the basis of the importance and the general applicability of the paragraph, namely that the paragraph was applicable to other forms of remedy as well. They felt that the paragraph raised the problem of the allocation of liability and, indeed, of diminished responsibility or exoneration from responsibility. Some other members felt that the expression "contributory negligence" should be avoided since it had a special meaning in the common law system. In that system, contributory negligence was used as a defence by the offending party in order to avoid the payment of any compensation. The intention of the paragraph was, however, to apportion the damage in respect of different causes and perhaps a different term could be used to reflect that idea.

377. The Special Rapporteur specified that in paragraph 5 he did not refer to contributory negligence as a cause of exclusion of wrongfulness. He referred to such injured State's conduct as might have concurred in causing damage. He was ready, in any case, to consider different language and was equally open to the possibility of turning paragraph 5 of article 8 into a separate article as suggested by some members.

Article 9. Interest [262]

378. The very basic premise for including interest in compensation, the Special Rapporteur explained, was found in the concept of full compensation and wiping out all the consequences of the wrongful act. He explained that while there was general support in literature and State practice for awarding interest on the principal damages, there was no consistency as to the date from which interest should be calculated and on the interest rate. Regarding the date from which interest should be calculated, he pointed out three positions that had emerged. First, a method frequently resorted to was to calculate interest from the date the damage had occurred. A second method, less frequently used, was to calculate interest from the date in which the *quantum* decision was rendered. A third method, also commonly used, was to calculate interest from the date on which the claim for damages had been filed at a national or international level. The third method had been based on the assumption that only the submission of a claim to the offending State could reasonably create the assumption of that State's knowledge about its international obligation. In practice, this choice of date was suggested by international tribunals, taking into account the circumstances which were specific to each case. Those circumstances included, for example, the fact that the claimant himself asked for interest only from the date the claim was

---

[262] Article 9, as proposed by the Special Rapporteur, read as follows:

"Article 9. Interest

1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

(i) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

(ii) shall run until the day of effective payment.

2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the most suitable to achieve that result."

made; the fact that the injured party waited a long time before putting forward a claim for damages; and the fact that the principal sum had already included such interest and was recommended in a lump sum. The Special Rapporteur stated that he felt the more proper date from which interest should be calculated was the date of the occurrence of the injury (dies a quo), since it was closer to the concept of full compensation according to the Chorzów principle.

379. As regards the interest rate, the Special Rapporteur stated that there was no uniform practice and there were few comments in the literature. Some cases used the rate applied in the offending State and others the rate used in the offended State. The Special Rapporteur stated that he had not yet taken a position on the issue and would welcome the views of the members. As for compound interest, the Special Rapporteur noted that in the absence of a uniform State practice, he was inclined to think that such interest should be awarded only when it was proved that it was indispensable to ensuring full compensation in the above-mentioned Chorzów sense.

380. The Commission generally agreed that interest was part of compensation and that it was necessary to indicate somewhere in the articles the obligation to pay interest in order to ensure complete reparation for damage caused by an internationally wrongful act. The views, however, differed as to detailed rules applicable in respect of the date from which interest should accrue, interest rate and compound interest.

381. For some members, any provision regarding interest should explicitly lay down the obligation to pay interest. However, article 9, as proposed by the Special Rapporteur, did not stipulate that obligation and had moved on to secondary issues of interest rates, etc. As regards the date from which interest should be calculated, some members preferred the date on which the damage had occurred since it would bring compensation much closer to wiping out all the consequences of a wrongful act; some other members preferred the date the claim was submitted since it was on that date that the wrongdoer State was notified of the wrongful act and of its obligation. A few members expressed preference for the date on which award or judgement was given. Many members

seemed to agree that interest should run until the date of payment. One member preferred, however, that interest should stop on the date of the award.

382. As regards interest rates, again various views were expressed. Some members felt that in setting interest rates, the level of economic development between the States concerned should be taken into account. Commercial rates were preferable between States on an equal level of economic development and differential interest rates as between States at different economic levels. Suggestions were also made to the effect that one should take into account the interest rates used in the countries involved, interest rates for public loans or loans offered by the World Bank.

383. In general however, it was agreed that determining interest rates depended much on the factual situation of a particular case and should be left to the discretion of the court or the arbitration tribunal. It was therefore preferable not to go into detail on that matter and not to formulate strict rules on interest rates.

384. It was also pointed out that, in practice, the allocation of interest was usually regarded as intended to compensate for the additional damage suffered by the victim as a result of the period of time which had elapsed between the occurrence of the damage and the final payment of compensation. In such cases, interest was allocated on the compensation as a whole without making any distinction between _damnum emergens_ and _lucrum cessans_. However, the Special Rapporteur seemed to put greater emphasis on the case of a claim regarding a sum of money or capital and on the fact that in such cases interest was awarded to compensate for the lost earnings resulting from the non-availability of that capital. A few members found no reasonable explanation for denying interest for loss of property.

385. As regards compound interest, dealt with in paragraph 2, most members felt that due to the absence of clear State practice, the matter should not be dealt with in the draft. For some members, compound interest might lead to arbitrary calculations and unfairness. It was generally agreed that paragraph 2 should be deleted.

386. Many members of the Commission preferred the deletion of the entire article 9 since they believed that the question of interest should be dealt with in a general formula. Such a general formulation could be included in paragraph 3 of article 8 or elsewhere in that article.

387. The Special Rapporteur specified that he had not intended to confine interest to sums of money. He agreed, however, with both the suggestion of deleting article 9 and of including the general obligation to pay interest in article 8, perhaps in paragraph 3.

Article 10. Satisfaction and guarantees of non-repetition 263/

388. The Special Rapporteur stated that a review of State practice and literature indicated that satisfaction had frequently been granted as an autonomous remedy, even though sometimes it was given in conjunction with other forms of remedy and occasionally so absorbed into pecuniary compensation that the award of satisfaction was difficult to perceive. In literature many authors viewed satisfaction as a specific remedy for injury to the State's

---

263/ Article 10, as proposed by the Special Rapporteur, read as follows:

"Article 10. Satisfaction and guarantees of non-repetition

1. In the measure in which an internationally wrongful act caused to the injured State a moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation, the State which committed the wrongful act is under an obligation to provide the injured State with adequate satisfaction in the form of apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof.

2. The choice of form or forms of satisfaction shall be made taking into account the importance of the obligation breached and the existence or degree of wilful intent or negligence of the State which has committed the wrongful act.

3. A declaration of wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction.

4. In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act or a violation of that State's sovereign equality or domestic jurisdiction."

dignity, honour or prestige. Some authors expressed the view that satisfaction was a remedy for juridical injury to a State regardless of the presence of any material damage. The distinction between satisfaction and other forms of remedy was not only in terms of the injury it covered, but also in terms of the forms it took. The Special Rapporteur noted that expressions of regret, punishment of the responsible person, safeguards against repetition, saluting the flag, payment of some symbolic sum, a judicial declaration, etc., were often mentioned in literature. He stated that the views expressed in literature seemed to be supported by State practice. While there were few judicial decisions explicitly granting forms of satisfaction, presumably because tribunals were inclined to feel that they lacked competence with regard to such forms of reparation, there was an impressive _corpus_ of diplomatic practice where satisfaction was granted. A more notable case in which satisfaction seemed to have been denied was the _Lusitania_ 264/ case, where the arbitrator concluded that superimposing a penalty in addition to full compensation (with the qualifying word exemplary, vindictive or punitive) would in his view be a hopeless confusion of terms. In the view of the arbitrator, such matters should have been settled at the diplomatic level. The Special Rapporteur interpreted this decision as having been based on lack of competence. There were, however, other judicial decisions, the Special Rapporteur noted, that supported granting satisfaction. Those cases included _Carthage_, 265/, _Manouba_, 266/, _Corfu Channel_, 267/, _I'm Alone_, 268/ and the _Rainbow Warrior Affair_. 269/

389. The Special Rapporteur stated that the relevant practice should be divided into three periods: (a) prior to the First World War; (b) between the

---

264/ _Supra_, note 241.

265/ UNRIAA, vol. 2, p. 475.

266/ _Ibid_., p. 458.

267/ _ICJ Reports_, 1949, p. 12.

268/ UNRIAA, vol. 3, p. 1618.

269/ UNRIAA, vol. 19, p. 199.

two World Wars; and (c) from the end of the Second World War to the present day. The practice of the first period revealed a high percentage of cases where the form or forms of satisfaction claimed and the very manner and terms in which the demands were formulated (usually against weaker States) were offensive to the honour, dignity and prestige of the allegedly law-breaking State. Therefore, even when any such arrogant demands had been met, the cases in question could not be considered to represent valid precedents, except in a negative sense. The practice of periods (b) and (c), on the contrary, showed (despite some exceptions) that satisfaction performed an important role among the remedies resorted to by States. This was particularly evident in cases where the injured party had suffered insults, ill-treatment or attacks against the Head of State or Government, its diplomatic or consular representatives or its nationals. Less easily susceptible of economic assessment, these types of "prejudice" were the most typical examples of what he called moral and legal injury. This did not exclude, however, that legal injury in particular was present among the effects of any internationally wrongful act.

390. As regards the nature of satisfaction, namely whether it was compensatory or punitive, the Special Rapporteur explained that the review of literature and State practice, in particular diplomatic practice, indicated the existence of various forms of satisfaction as a remedy apart from compensatory forms of remedy and partly marked by its retributive or punitive nature. Such distinction in the nature of various forms of reparation, the Special Rapporteur maintained, was not of course absolute. In his view, the function of pecuniary compensation, for example, was not entirely limited to compensating the material loss. It also had, at least, the function of dissuading or preventing the commission of wrongful acts in the future. Nevertheless, satisfaction was distinguished from other remedies by its predominantly retributive rather than compensatory role. The Special Rapporteur stated that he did not find the retributive or punitive character of satisfaction incompatible with the sovereign equality of States. This belief of his was based upon the consideration that none of the forms of satisfaction usually resorted to involved a direct action of the injured State vis-à-vis the offending State. They were either self-inflicted sanctions or sanctions administered by an international body. In either case they would

fall quite short of such sanctioning measures as reprisals and retorsion, where a penalty was directly inflicted by the injured State itself.

391. As to the choice of the form of satisfaction, the Special Rapporteur stated that the study of practice showed that the gravity of the wrongful act or the importance of the obligation breached and the degree of fault or wilful intent of the wrongdoer State were taken into account.

392. The fact, however, that the form of reparation in question had been in the past seriously abused by States which were in a more powerful position made it necessary to limit resort to satisfaction by the requirement that the forms of satisfaction should not include humiliating demands or the violation of sovereign equality of the wrongdoer State.

393. The Special Rapporteur felt that the literature seemed to support the view that safeguards against repetition was a form of satisfaction, even though it did not introduce much clarity about the forms that such guarantees could take. The purpose of guarantees of non-repetition, the Special Rapporteur explained, was that sometimes the injured State believed that restoration of the situation to what it was before the occurrence of the wrongful act was insufficient, because of the strong possibility of repetition of the wrongful act. With regard to this remedy, the Special Rapporteur explained that a number of issues should be considered. They included: (1) the source of the offending State's obligation to provide such guarantees; (2) whether the offended State's request was necessary; (3) whether the offended or the offending State should choose the form of guarantees; and (4) whether the offending State may refuse to provide such safeguards. With respect to the forms of guarantees, the Special Rapporteur noted that there seemed to be no uniform practice. In most cases, the injured State had demanded safeguards for non-repetition. In some cases, the request was limited to, for example, the better protection of citizens and their property. In other cases, the request for guarantees went so far as to include the adoption or abrogation by the offending State of specific legislative provisions. This form of guarantee, the Special Rapporteur explained, was rather common in cases of violations of human rights in which *ad hoc* international bodies requested States responsible for violation of such

rights to modify their legislation in order to prevent repetition of violations. The analysis of doctrine and State practice, in the view of the Special Rapporteur, led to the conclusion, with which he concurred, that guarantees of non-repetition of a wrongful act was one of the forms of satisfaction.

394. It was generally agreed in the Commission that satisfaction was an appropriate mode of remedy apart from restitution in kind and pecuniary compensation. It was, however, emphasized that satisfaction must be viewed as a form of remedy which was given in conjunction with other forms of remedy.

395. As regards the purpose of satisfaction, some members found the approach by the Special Rapporteur too narrow to the extent that he had conceptualized satisfaction only in terms of providing a remedy for the injured State. In their view, satisfaction had a much broader function of restating the rule of international law that was violated. Considering the fact that breaches of international obligations could constitute practice for future violations, reaffirmation of those norms, through the remedy of satisfaction, played an important role in comtemporary international law. Satisfaction, it was felt, served to protect weaker States. For example, in a case of pollution in which the author State was rich and thought it could afford to pay compensation, it would go ahead and inflict pollution on the weaker State and, in effect, expropriate an easement allowing it to pollute against payment. Satisfaction could help to deter that type of conduct by requiring the stronger State to make appropriate amends.

396. As regards the nature of satisfaction, many members disagreed with the "punitive" nature of satisfaction as had been defined by the Special Rapporteur. In their view, the concept of punitive damages was inconsistent with sovereign equality of States. Punitive damages also automatically called for third-party adjudication, since no State would unilaterally agree to punish itself. In addition, the concept of punishment belonged to the topic of the draft Code of crimes against the peace and security of mankind and even there punishment referred to the punishment of individuals.

397. Some members, however, did not disagree with the proposition that satisfaction had a more punitive character in comparison with other forms of

remedy, but felt that the word "punitive" was inappropriate. In their view, at some level, all forms of remedy had some kind of retributive function. When deciding on the consequences of international crimes under article 19 of Part One of the draft, they felt they would have to deal with sanctions which had surely a punitive nature. They, however, agreed that the matter could be re-examined when dealing with countermeasures and the consequences of crimes under article 19.

398. With regard to the question of the nature of satisfaction, the Special Rapporteur stated that on further reflection he believed the term "afflictive" to be inappropriate. Indeed, in a number of languages, it was used with regard to forms of punishment applicable only to human beings. He confirmed his belief, however, in the retributive - and in that sense punitive - function of satisfaction. On the other hand, he did not think that the real question was whether the adjective would be used. What mattered was the retributive function of satisfaction. This remedy placed itself half-way between the purely compensatory forms of reparation, such as pecuniary compensation and _naturalis restitutio_, on the one hand, and those predominantly retributive remedies which were represented by reprisals and sanctions in general on the other hand. After all, the Commission was required to deal with similar concepts not only in its work on the Draft Code of Crimes against the Peace and Security of Mankind - such crimes to be attributable, _inter alios_, to Heads of State or Government - but also in codifying and developing the consequences of the international crimes of States as defined in article 19 of Part One.

399. As regards the type of damage for which satisfaction should be granted, some members found the scope of "moral or legal injury" in paragraph 1 too broad in the light of the definition the Special Rapporteur had given. The concept of "legal injury", defined by the Special Rapporteur as the infringement of the State's rights _per se_ and independent from the infringement of the State's dignity, honour and prestige, existed in any wrongful act. Therefore, by definition, there was always a legal injury when a rule of international law was breached and it would result from that theory that satisfaction would have to be granted for every single breach. That

approach did not seem practical. Considering the increasing number of inter-State co-operation agreements and consequently the increasing possibility for technical and bureaucratic violations, it seemed unreasonable each time to ask for satisfaction. In most cases, it was enough for the aggrieved State to remind the other State of its obligation. The article on satisfaction should display some degree of moderation with respect to petty violations of that kind. Satisfaction in the view of these members should be limited to the infringement of the State's dignity, honour and prestige which gave an approximate idea of those attributes of a State which could suffer "moral damage". These members felt that the reference to "legal injury" should, therefore, be deleted.

400. Some members also felt that the reference to "nominal or punitive damages" should be deleted not only because it gave a punitive character to satisfaction, but also because it was theoretically inconsistent with the very assumptions on the basis of which the article on satisfaction was formulated, namely damage not economically assessable. If such damage were assessable, it should be covered by article 8 on reparation by equivalent. It was also suggested that the reference to apologies as a form of satisfaction be changed to "expressions of regret" which appeared more feasible. Some members, however, referred to the ruling of the Secretary-General on the Rainbow Warrior Affair of 6 July 1986 270/ between France and New Zealand in which apologies were recommended and given by France in addition to other forms of satisfaction.

401. According to the Special Rapporteur, the question of "moral and legal injury" was a matter to be considered with the utmost care, particularly in view of the importance of the rules of international law concerning human rights and the environment. As he noted in reply to the preoccupations expressed by some members according to whom article 8, paragraph 1, did not seem to cover the position of States not directly or not materially injured by a violation of such rules, it was precisely in the language of paragraph 1 of

---

270/ Ibid.

article 10 that such injured States could find the basis to claim remedy. If, in the case of certain violations, a legal injury did not appear to be covered by any form of satisfaction, this was because in some such cases satisfaction was absorbed, so to speak, into pecuniary compensation.

402. Many members agreed that guarantees of non-repetition of the wrongful act was a form of satisfaction. There were a number of ways such guarantees could be given. For example, under articles 26 and 34 of the Constitution of the International Labour Organisation relating to complaints filed by a member State against another, the commission of inquiry investigating the matter could recommend the adoption of certain measures to remedy certain irregular situations. Some members were not convinced that the guarantees of non-repetition of the wrongful act should be limited to moral damage to a State. In their view, when a wrongful act caused monetary damage and there was a fear that such wrongful act might be repeated, a request for guarantees of non-repetition of the wrongful act was quite reasonable and proper. For a few members, satisfaction and guarantees of non-repetition of the wrongful act constituted two different consequences of failure to comply with an international obligation. The former addressed the past, while the latter looked into the future and for that reason they should each be the subject of separate articles and the various forms of guarantees of non-repetition should be explored in more detail.

403. The Special Rapporteur stated that he found in the above considerations an additional reason to maintain legal injury - in addition to moral damage or injury - as a justification for the demand and the grant of satisfaction. He was also ready to consider a separate article for guarantees of non-repetition.

404. With regard to the forms of satisfaction, some members felt that instead of enumerating those forms, it was preferable to think of some general terms to cover various measures which might be necessary. Many members, however, agreed with the Special Rapporteur that the importance of the obligation violated and the degree of negligence of the wrongdoer State should be taken into account in choosing the form or forms of satisfaction. It was generally agreed that the declaration of wrongfulness of the act by a competent international tribunal would, in some circumstances, be appropriate

satisfaction. There were many precedents to that effect. It was noted that in the recent award of 30 April 1990 in the Rainbow Warrior case the tribunal specifically stated in paragraph 8 of its decision that the condemnation of one party for breaches of its treaty obligations to the other made public by the decision of the tribunal, constituted in the circumstances appropriate satisfaction for the legal and moral damage caused.

405. As regards paragraph 4 of article 9, some members felt that it should be deleted since it was generally understood that the forms of satisfaction should not be humiliating to States and inconsistent with their sovereign equality. Others, however, felt that precisely because in the past some States had abused this form of remedy and had imposed humiliating demands on weaker States, paragraph 4 should remain as a safeguard.

406. Some drafting suggestions were also made. In particular, it was noted that paragraph 4 provided that a "claim" for satisfaction shall not include humiliating demands. This drafting was unusual since the article did not deal with "claims" of aggrieved States, but with the law applicable in a particular situation and the rights and obligations of the parties. That part of the text should therefore be drafted differently.

407. It was noted by some members that the indication of the forms of satisfaction should not be exhaustive. The Special Rapporteur agreed that the drafting should be adapted accordingly.

3. The impact of fault on the forms and degrees of reparation

408. The Special Rapporteur stated that fault had not played an important role in the conceptualization of Part One of State responsibility. In his view Part Two, the determination of specific consequences of an internationally wrongful act, could not ignore the importance that fault played in such determinations. The importance of fault was particularly emphasized by the fact that Part Two had to deal with the consequences of international crimes as well as delicts. Fault in the view of the Special Rapporteur referred to wilful intent or negligence of the offending State. In that context the Special Rapporteur raised two issues: first, whether fault should play a role in the determination of the consequences of a wrongful act; and, secondly, how fault could be attributed to a State. As regards the first

issue, the Special Rapporteur felt that a decision on the role of fault in the forms and degree of severeness of consequences was a policy decision and eventually a legal one. In the view of the Special Rapporteur, it seemed both logical and rational, as recognized by a number of authorities, that the presence of fault and the degree of wilful intent or negligence should play some role in the degree of responsibility and hence of consequences. As regards the second issue, namely how fault could be attributed to a State, the Special Rapporteur stated that that issue was a factual one and in his view this was in substance the implication of the relevant articles of Part One of the draft. As such, the determination of the existence or absence of fault should be left, in his view, to appropriate decision-makers such as the international arbitral tribunals and courts. He admitted that the determination of whether or not there was a wilful intent or negligence on the part of a wrongdoer State was a complex question. An act of a State as an international person was mostly, if not always, composed of a plurality of acts and attitudes emanating from different levels of hierarchy of the State's organization. He explained that just as the conduct of one or more low-ranking officers might or might not *per se* be considered, in fact, conduct of a State as an international person, the so-called psychological attitudes of such officers might or might not constitute in fact a fault of the State; the determination of the presence and degree of such an element involved an equally global consideration of the internal organization of a modern State. In his view, the fact that for such determination one could not rely on legal rules might explain in part the doubts that had been expressed about the impact and the role of fault in international law.

409. As regards the impact of fault on pecuniary compensation, the Special Rapporteur explained that the study of jurisprudence seemed to indicate that fault had not played any role in the determination of the *quantum* of damages, damages being in most cases calculated solely on the basis of the nature and the extent of the injury caused. He indicated that in a few cases, however, fault seemed to have been taken into account. In addition, he stated that it was quite conceivable that fault might have been taken more frequently into account by arbitrators implicitly. This should be given due consideration in

deciding whether to agree with the prevailing doctrinal view that the presence and the degree of fault or intentional element should in no way affect the computation of compensation. Although this approach was compatible with the narrow definition of pecuniary compensation, he none the less cautioned that such interpretation might not always be correct for the following reasons: (a) the various forms of reparation did not operate, in practice, in isolation; (b) the compensatory and retributive functions were in a sense always present in any one of the forms of reparation; and (c) the retributive or punitive function which seemed to be most typical of satisfaction might also in some cases affect the computation of damages in the form of the award of a higher amount of pecuniary compensation.

410. As regards the role of fault in satisfaction, the Special Rapporteur stated that it was clear that fault had played an important role with respect to the forms and degrees of satisfaction. State practice, particularly diplomatic practice, was marked by this trend. He mentioned that in most of the post-Second World War diplomatic practice, some degree of fault was presumably admitted by the offending State, in consideration either of the fact that the injury had been inflicted on foreign nationals or agents by public officials, or by the fact that the objects of injury were persons or premises with regard to which the injured State was entitled to special protection. According to the Special Rapporteur, the question remained, however, to what extent the fault of a low-ranking State agent was in fact the fault of the offending State. The Special Rapporteur stated that, subject to further research and reflections, he was inclined to believe that a State could not be considered to be exempt from fault when it did not provide the members of its organization - particularly the members of the police and the armed forces - with adequate instructions concerning the positive and negative duties incumbent upon them with regard to the treatment of foreign nationals and agents.

411. Some members of the Commission who spoke on the question of fault agreed with the general view of the Special Rapporteur that fault should play some role in the determination of the forms of remedy. They noted that since the Special Rapporteur himself had expressed only tentative views on the matter, the issue should perhaps be re-examined more thoroughly in the future. They

nevertheless expressed some preliminary views. For example, some pointed out that the somewhat mystical view of the State and the efforts to elude the question of fault resulting from that approach would, sooner or later, have to yield to the need to consider the place of fault in State responsibility. They believed that, while fault would be of particular importance when the Commission went on to consider responsibility for crimes such as genocide or aggression, the issue was also relevant in connection with delicts. For a few members, fault was only one of the many factors which should affect the degree and form of remedies. Other factors included the importance of the obligation breached, etc. and they were not convinced that only fault should be singled out.

412. A few members felt that the question of attribution of fault to a State was a very complex one and required careful examination. They felt that fault by State agents should not be imputed indiscriminately to the State. Nor were they entirely certain that fault was irrelevant to the forms and degree of reparation by equivalent. Such an approach, it was felt, might break the logical and theoretical balance of the draft as a whole. A few members did not feel it was prudent that the Commission, at this stage of development of the topic, should open up the relevance of fault as an element of an internationally wrongful act for the purposes of Part One. As for Part Two of the draft, a few members questioned the advisability of dealing with the problem of fault, at least until the Commission had examined the consequences of international crimes.

C. Text of the draft articles of Part Two provisionally adopted so far by the Commission [271]

413. The texts of the draft articles of Part Two provisionally adopted so far by the Commission are reproduced below.

---

[271] As a result of the provisional adoption of draft article 5 at the thirty-seventh session, the Commission introduced consequential modifications in certain draft articles provisionally adopted at its thirty-fifth session (see Report of the International Law Commission on the work of its thirty-seventh session, Yearbook ... 1985, vol.II (Part Two), p. 20, para. 106). These modifications were as follows: in draft articles 2 and 3, the references to "articles [4] and 5" were changed to read "articles 4 and [12]"; and draft article 5 was renumbered 4.

Article 1 [272]

The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

Article 2 [273]

Without prejudice to the provisions of articles 4 and [12], the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3 [274]

Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

Article 4 [275]

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

---

[272] Provisionally adopted by the Commission at its thirty-fifth session. For the commentary to the article see *Yearbook ... 1983*, vol.II (Part Two), p. 42.

[273] *Ibid*., pp. 42-43.

[274] *Ibid*., p. 43.

[275] *Ibid*.

Article 5 276/

1. For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

2. In particular, 'injured State' means

(a) if the right infringed by the act of a State arises from a bilaterial treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilaterial treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms.

276/ Provisionally adopted by the Commission at its thirty-seventh session. For the commentary to the article see Yearbook ... 1985, vol.II (Part Two), pp. 25-27.

(f) if the right infringed by the act of a State arises from a multilaterial treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

CHAPTER VI

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

A. Introduction

414. The topic entitled "Relations between States and international organizations" has been studied by the Commission in two parts. The first part, relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session in 1971, when it adopted a set of draft articles and submitted them to the General Assembly. 277/

415. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference, which was convened in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. 278/

416. At its twenty-eighth session, in 1976, the Commission began consideration of the second part of the topic, dealing with the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States. 279/

277/ *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq*., document A/8410/Rev.1, chap. II, sections C and D.

278/ *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication - Sales No.: E.75/V.12), p. 207, document A/CONF.67/16.

279/ *Yearbook ... 1976*, vol. II (Part Two), p. 164, para. 173.

417. Between the twenty-ninth (1977) and the thirtieth (1978) sessions of the Commission, the former Special Rapporteur submitted two reports, which were duly considered by the Commission. 280/

418. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz González Special Rapporteur for the topic. 281/

419. Owing to the priority that the Commission had assigned, on the recommendation of the General Assembly, to the conclusion of its studies on a number of topics in its programme of work with respect to which the process of preparing draft articles was already advanced, the Commission did not take up the topic during its thirty-second session, in 1980, or during its subsequent two sessions. It resumed work on the topic only at its thirty-fifth session, in 1983.

420. Between the thirty-fifth and forty-first sessions of the Commission, the Special Rapporteur submitted four reports. 282/ At those sessions, the Commission adopted a number of preliminary decisions concerning the topic and adopted an outline of the subject-matter to be covered by the draft articles which the Special Rapporteur would prepare on the topic. 283/

280/ See (a) Preliminary Report, Yearbook ... 1977, vol. II (Part One), p. 139, document A/CN.4/304; (b) Second report, Yearbook ... 1978, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1; (c) For a summary of the discussion of both reports in the Commission, the conclusions reached and the action taken by the Secretariat, see Report of the International Law Commission on the work of its thirty-ninth session (Official Records of the General Assembly, Forty-second session, Supplement No. 10 (A/42/10)).

281/ Yearbook ... 1979, vol. II (Part Two), p. 189, document A/34/10, para. 196.

282/ First report: Yearbook ... 1983, vol. II (Part One), document A/CN.4/370. Second report: Yearbook ... 1985, vol. II (Part One), document A/CN.4/391 and Add. 1. Third report: Yearbook ... 1986, vol. II (Part One) document A/CN.4/401. Fourth report: Yearbook ... 1988, vol. II (Part One), document A/CN.4/424 and Corr.1.

283/ For a fuller summary of the historical background to the topic, see the Report of the International Law Commission on the work of its forty-first session, (Official Records of the General Assembly, Forty-fourth session, Supplement No. 10, (A/44/10)), paras. 686-707. The text of the outline is reproduced in footnote 269 to that report.

421. At its forty-first session in 1989, the Commission was unable to study the topic owing to lack of time and therefore did not discuss the Special Rapporteur's fourth report (A/CN.4/424 and Corr.1). The Commission nevertheless thought it advisable for the Special Rapporteur to introduce his report in order to facilitate work on the topic at its next session and the Special Rapporteur did so. [284]

B. Consideration of the topic at the present session

422. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/424 and Corr.1) and his fifth report (A/CN.4/432), which, owing to lack of time, could not be introduced by the Special Rapporteur or considered by the Commission.

423. The Commission examined the fourth report of the Special Rapporteur at its 2176th to 2180th meetings. After discussing draft articles 1 to 11 contained in that report, the Commission decided, at its 2180th meeting, to refer them to the Drafting Committee. The comments and observations by the members of the Commission on those articles are summarized in paragraphs 424 to 463 below.

424. There was broad support in the Commission for the path charted for the topic by the Special Rapporteur in his fourth report. Some members pointed out that the Commission could now give the topic more attention since it had completed or nearly completed its consideration of other topics. Some members also emphasized the usefulness of the topic, which would put some order in the diversity and disparity of the law governing international organizations.

425. Some members, while not questioning the need to pursue work on the topic and fulfil the mandate the General Assembly had given the Commission, thought that it might be necessary, before continuing with the study of the topic, to define the ultimate aim of the draft articles which would be adopted and their relationship with the many existing instruments, namely, the constituent instruments of the various organizations covered by the draft, conventions on privileges and immunities and headquarters agreements.

---

[284] *Ibid*., paras. 708-726.

426. One member said that he had doubts whether any useful results could be achieved and whether such results would be acceptable to the States for which the draft articles would be intended. He did not see any urgent need to undertake the codification of a subject-matter which was, in his opinion, already adequately regulated by various instruments in force, such as conventions on privileges and immunities and headquarters agreements. He thought that the Commission should continue to defer its consideration of the topic.

427. The Special Rapporteur, referring to views expressed by several members recalled that the Commission's duty was to comply with the mandate assigned to it by the General Assembly and reaffirmed in annual Assembly resolutions on the report of the Commission. The meaning and orientation of the topic, as well as its content, had been defined by the Commission at its thirty-ninth session in 1987, when it had adopted the outline of the subject matter which it had requested the Special Rapporteur to submit to it. 285/ The Special Rapporteur noted that many other topics on the Commission's agenda also encompassed aspects regulated by existing instruments. Referring to the Commission's role in the codification of international law, he stated that it would be useful to systematize and organize rules on the topic. Indeed, a close look at the international situation showed that there were many gaps to be filled and problems to be solved. For example, he noted, many problems had arisen in recent years between some organizations and host countries in connection with the rights and obligations of officials, experts and persons having official business with organizations. The Special Rapporteur therefore emphasized the importance of considering fully the draft articles and referring them, following such consideration, to the Drafting Committee.

428. Other comments made in the Commission related to specific aspects of the draft articles submitted by the Special Rapporteur.

285/ See para. 420 above.

429. With regard to article 1, 286/ one member said that the title of the English text should be "Use of terms". Several members also indicated that the definition of an "international organization" in paragraph 1 (a) should make it clear that the "universal" character of the organization derived from the fact that membership was open to all States, not from the actual number of member States of the organization. One member suggested that the words "of a universal character" should be placed in square brackets in view of the possibility that the scope of the draft articles might subsequently be extended to regional organizations.

286/ Article 1, as proposed by the Special Rapporteur, read as follows:

"Article 1. Terms used

1. For the purposes of the present draft articles:

(a) "International organization" means an intergovernmental organization of a universal character;

(b) "Relevant rules of the organization" means, in particular, the constituent instruments of the organization, its decisions and resolutions adopted in accordance therewith and its established practice;

(c) "Organization of a universal character" means the United Nations, the specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are of a world-wide character;

(d) "Organization" means the international organization in question;

(e) "Host State" means the State in whose territory:

(i) The organization has its seat or an office, or

(ii) A meeting of one of its organs or a conference convened by it is held.

2. The provisions of paragraph 1 of this article regarding the use of terms in the present draft are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State."

430. The Special Rapporteur agreed that the words "of a universal character" in paragraph 1 (a) had been used to mean "with a potential for universality"; perhaps that wording should be adopted in order to cover organizations such as those set up by producers and consumers of certain commodities. He would have no objection if all or part of paragraph 1 (a) was placed in square brackets until a final decision had been taken on whether regional organizations should come within the scope of the articles.

431. With regard to paragraph 1 (b), some members suggested that the word "relevant", which modified the words "rules of the organization", should be deleted in order to ensure greater uniformity with the wording used in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. One member said that the words "its established practice" should be deleted because practice was constantly changing and was subject to interpretation and could therefore not be stated in the form of a rule. Other members nevertheless said that those words were entirely acceptable and had been included in the 1986 Vienna Convention (art. 2, para. 1 (j)).

432. Referring to paragraph 1 (c), some members said that the words "of a world-wide character" were too vague. In that connection, one member suggested the word "global". Some members also said that the word "responsibilities" should be replaced by the word "functions". One member pointed out that the specific reference to the "International Atomic Energy Agency" was unnecessary and another member that the word "similar" was ambiguous.

433. As to paragraph 1 (e) and the concept of "host State", one member suggested that reference should also be made to States where officials of international organizations were on official mission. In that connection, one member asked whether the word "office" in paragraph 1 (e) (i) also included temporary offices of a subsidiary body of the organization, such as the field operations offices of the United Nations Peace-keeping Forces. The Special Rapporteur said that that term referred to any premises used by an organization to perform its functions, as stated in Articles 104 and 105 of the Charter of the United Nations, as well as in the relevant provisions of

the headquarters agreements or constituent instruments of various international organizations. He said that a parallel could be drawn with the definition of the term "premises" contained in article 1 (i) of the 1961 Vienna Convention on Diplomatic Relations.

434. One member suggested that article 1, paragraph 2, should be deleted because it was unnecessary.

435. Referring to draft article 1 as a whole, some members said that, as the Commission made headway in its consideration of the topic, account should be taken of the possibility of incorporating other definitions.

436. With regard to article 2, 287/ several members said that they agreed with the Special Rapporteur's approach of limiting, in principle, the scope of the articles to international organizations of a universal character, without prejudice to the possibility that, at a later stage, the scope might be extended to other organizations, such as regional organizations.

437. Different viewpoints were expressed with regard to the last phrase of paragraph 1. While some members thought that the words "when the latter have accepted them" should be deleted, others said that they should be retained in order to make the draft articles more acceptable.

287/ Article 2, as proposed by the Special Rapporteur, read as follows:

"Article 2. Scope of the present articles

1. The present articles apply to international organizations of a universal character in their relations with States when the latter have accepted them.

2. The fact that the present draft articles do not apply to other international organizations is without prejudice to the application of any of the rules set forth in the draft which would be applicable under international law independently of the draft articles (Convention).

3. Nothing in the present draft articles (Convention) shall preclude the conclusion of agreements between States or between international organizations making the draft articles (Convention) applicable in whole or in part to international organizations other than those referred to in paragraph 1 of this article."

438. Some members expressed doubts about the need for paragraph 2. Other members were in favour of the deletion of paragraph 3. It was also suggested that paragraph 3 should be replaced by optional protocols that would make it possible to extend the scope of the articles to other organizations not referred to in paragraph 1.

439. With regard to article 3 288/, some members thought that it should be worded more clearly in order to remove the ambiguity introduced by the words "without prejudice to". It was noted that its wording would have to be reconsidered in the light of the final results of the Commission's work on the draft articles as a whole.

440. Referring to article 4, 289/ some members said that the relationship between the draft articles and agreements in force should be more clearly defined. One member was of the opinion that, if the draft articles were "without prejudice" to agreements in force on the subject-matter, the need for the former would be highly doubtful. It was also stated that the question of the relationship between the draft articles and future agreements on the same

---

288/ Article 3, as proposed by the Special Rapporteur, read as follows:

"Article 3. Relationship between the present draft articles (Convention) and the relevant rules of international organizations

The provisions of the present draft articles (Convention) are without prejudice to any relevant rules of the organization."

289/ Article 4, as proposed by the Special Rapporteur, read as follows:

"Article 4. Relationship between the present draft articles (Convention) and other international agreements

The provisions of the present draft articles (Convention):

(a) Are without prejudice to other international agreements in force between States or between States and international organizations of a universal character; and

(b) Shall not preclude the conclusion of other international agreements regarding the privileges and immunities of international organizations of a universal character."

subject-matter should be regulated by the applicable rules of treaty law and that it would be advisable to reconsider article 4 when all the draft articles had been completed.

441. Two comments on methodology were made with regard to articles 5 and 6 290/ contained in part II of the draft submitted by the Special Rapporteur and relating to legal personality. The first was that the present wording of the articles did not distinguish clearly between the legal personality of the organization under international law and its legal personality under the internal law of its member States and the host country. The second was that, although the capacity of an international organization to conclude treaties was expressly provided for, other legal consequences of the international legal personality of an organization were not. In this connection, it was suggested that one article should refer exclusively to international legal personality and the legal powers deriving from it at the international level, such as capacity to conclude treaties, capacity to file an international claim and the active and passive right of legation. Another article would refer to legal personality under internal law and the legal powers deriving therefrom.

290/ Articles 5 and 6, as proposed by the Special Rapporteur, read as follows:

"Article 5

International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property; and

(c) Institute legal proceedings.

"Article 6

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization and by international law."

442. In the opinion of some members, articles 5 and 6 should also reflect more clearly the functional criterion that should govern the granting of legal personality to an organization.

443. Some specific comments were made on the wording of articles 5 and 6.

444. With regard to article 5, one member pointed out that, as it now stood, subparagraph (c) might give the impression that organizations were being given the right to sue and be sued before the International Court of Justice, something that would be contrary to the Statute of the Court. Another member noted that, in view of developments in international society, article 5 should not give the impression of being exhaustive. He therefore suggested that the words "in particular" be added after the words "shall have the capacity". Another member suggested that the chapeau should simply state that "International organizations shall enjoy legal personality".

445. Different viewpoints were expressed with regard to article 6. One member considered that the addition of the words "and by international law" strengthened the provision, which virtually reproduced the wording of article 6 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Another member considered that article 6 was superfluous because it repeated provisions contained in other international instruments. Yet another member was of the opinion that article 6 offered a reasonable solution to conflicting opinions on the capacity of international organizations to conclude treaties.

446. Referring to some of those comments, the Special Rapporteur pointed out that, in his second report, he had submitted two alternatives relating to the legal personality of international organizations: alternative A, which referred in the same article to the concepts of international legal personality and the capacity of an organization to conclude treaties; and alternative B, which referred to the two concepts in separate articles. In its fourth report, he had submitted two separate articles, in order to comply with the wishes of the majority of the members of the Commission who had, at that time, expressed a preference for alternative B: international personality was dealt with in one of the articles while the other was devoted to the capacity to conclude treaties. With regard to the internal legal capacity of an organization, he said that he had taken particular account of

Article 104 of the Charter of the United Nations and similar provisions contained in other agreements, such as article XII of the Constitution of UNESCO and article 211 of the Treaty establishing the European Economic Community. He had dealt at length with that question in paragraphs 31 *et seq.* of his second report.

447. Referring to part III of the draft on "Property, funds and assets" of an organization, one member suggested that the title should be amended to reflect its content more clearly, namely, jurisdictional immunities of the organization, the status of its premises and freedom to transfer funds and other assets. That member also suggested that part III should be divided into two or three chapters, with article 10 forming a chapter on its own.

448. Considerable support was expressed by some members for the underlying philosophy of article 7. 291/ Those members stressed that the current tendency to restrict the jurisdictional immunities of States should not be extended to international organizations. The concept of the absolute immunity of the property, funds and assets of international organizations was embodied in the two Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies of 1946 and 1947, respectively, as well as in many constituent instruments of international organizations and headquarters agreements. In their view, that concept had to be maintained. Unlike the jurisdictional immunity granted to States, which applied only to the property, funds and assets of a particular State, immunity from jurisdiction in the case of international organizations was granted to protect the interests of all the member States, which could, in the particular case of organizations of a

---

291/ Article 7, as proposed by the Special Rapporteur, read as follows:

"Article 7

> International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion."

universal character, represent most of the international community. They added that to apply the criterion of functional necessity to the immunity of organizations would be an error, since immunity was a legal means of guaranteeing the unhampered fulfilment of the purposes of the organization, whatever their nature or extent. Quite apart from the specificity of the purposes of each organization, all organizations, especially those of a universal character covered by the draft articles, had common features (problems relating to headquarters, personnel, contributions by member States, etc.) and the most common was the obligation to achieve the purposes for which they had been established. In their view, it was especially in the light of those common features that absolute immunity was necessary to guarantee the independent functioning of international organizations.

449. One member who was in favour of the rule of absolute immunity nevertheless pointed out that procedures and mechanisms had to be established to enable individuals to assert their rights in the event of a dispute with an international organization. In his opinion, such cases, which were outside the jurisdiction of domestic courts, could be referred to arbitral tribunals.

450. Another member who supported the general thrust of article 7 suggested that it might be balanced by adding another subparagraph stating that it was the duty of the organization to respect the laws and regulations of the host State.

451. Some drafting suggestions were also made. One member suggested that the kinds of jurisdiction from which organizations were immune, civil or administrative, should be spelt out and that, in the English text of the article, the words "every form of legal process" should be replaced by the word "jurisdiction". Some members also suggested that there should be a separate article or paragraph for the question of immunity from execution. One member suggested that the part of the article relating to waiver of immunity should be strengthened, so that it would clearly state that waiver of immunity from jurisdiction would not be considered as including waiver of immunity from execution, for which a separate waiver would be necessary.

452. Lastly, some members expressed reservations about the article as a whole. One member in particular said that he could conceive of international

organizations of a universal character that might, for functional reasons, not require immunity from jurisdiction. According to that member, even in cases where it was necessary to grant some degree of immunity, it could not be said that international organizations should enjoy greater immunity than their member States. In his opinion, the greater degree of immunity that might be necessary for an organization of a special nature, such as the United Nations, did not have to be extended to other organizations, in view of the specificity of their functions. Another member said that he was in favour of excluding from the article the absolute immunity of organizations from the jurisdiction of the host country and preferred specific immunity clauses.

453. In general, the members of the Commission expressed support for article 8, 292/ although they made some suggestions regarding the content and the wording. For example, several members pointed out that the article should encompass not only the duty to refrain from certain acts to respect the inviolability of an organization's premises, but also the active duty to protect those premises against any disturbance. In that regard, the Special Rapporteur said that he had referred in his report to this aspect of the matter and had no objection whatsoever to the idea being incorporated in

---

292/ Article 8, as proposed by the Special Rapporteur, read as follows:

"Article 8

1. The premises of international organizations used solely for the performance of their official functions shall be inviolable. The property, funds and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or coercion, whether by executive, administrative, judicial or legislative action.

2. International organizations shall notify the host State of the location and description of the premises and the date on which occupation begins. They shall also notify the host State of the vacation of premises and the date of such vacation.

3. The dates of the notification provided for in paragraph 2 of this article, except where otherwise agreed by the parties concerned, shall determine when the enjoyment of the inviolability of the premises, as provided for in paragraph 1 of this article, begins and ends."

the text of the article. While some members thought that the phrase "used solely for the performance of their official functions" was suitable for describing the premises as inviolable, another member took the view that the phrase could unduly restrict the inviolability of international organizations. He also thought that article 8 should make it clear that no agent of the host State could enter the premises of an international organization without the organization's consent. Another member thought that the word "premises" called for greater precision in order to make its scope perfectly clear.

454. One member expressed doubts that an organization's premises had the same degree of functional necessity calling for inviolability as was the case with the premises of a State's embassy or mission.

455. Some members expressly supported the inviolability of the premises of the organization and the immunity of its property, funds and assets from expropriation, as proposed in article 8, paragraph 1. Other members questioned whether such immunity was in keeping with international law at the present time. In that connection, the Special Rapporteur pointed out that it was generally agreed that the property of international organizations could not be expropriated by the host country on the grounds of public interest. That would, among other things, place the host State in an inadmissible position of superiority in relation to the organization's member States. In many legal systems, the régime governing the immovable property of international organizations was modelled on the régime applicable to property in the public domain, which was regarded as inalienable under internal law.

456. With reference to article 9, 293/ several members generally supported the content and the underlying principle. They pointed out that the

---

293/ Article 9, as proposed by the Special Rapporteur, read as follows:

> "Article 9
>
> Without prejudice to the provisions of the present draft articles (Convention), international organizations shall not allow their headquarters to serve as a refuge for persons trying to evade arrest under the legal provisions of the host country, or sought by the authorities of that country with a view to the execution of a judicial decision, or wanted on account of *flagrans crimen*, or against whom a court order or deportation order has been issued by the authorities of the host country."

provision was justified by the functional approach to privileges and immunities and that it was a safeguard against possible abuses.

457. As to the wording, it was suggested that the article should refer not only to the headquarters stricto sensu, but also to the premises of the organization in general. It was also pointed out that it might be advisable to omit the reference to persons "wanted on account of flagrans crimen", since such a concept did not exist in every legal system.

458. Other members, however, thought that article 9 was unnecessary and counter-productive. It was unnecessary because the fact that it was impossible for the organization to grant refuge to the persons referred to in it stemmed from the functional nature of privileges and immunities that was embodied in other articles. And it was counter-productive because it could be invoked to prevent an international organization from granting refuge in justifiable cases, for example in the case of persons wanted strictly for political reasons, where refuge or asylum made it possible to protect a fundamental human right, such as the right to life or physical integrity.

459. With regard to article 10, [294] some members expressed reservations about the breadth of the privileges and immunities provided therein. They

---

[294] Article 10, as proposed by the Special Rapporteur, read as follows:

"Article 10

Without being restricted by controls, inspections, regulations or moratoria of any kind,

(a) International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency,

(b) International organizations may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency,

(c) International organizations shall, in exercising their rights under (a) and (b) of this article, pay due regard to any representations made by the Government of any member State party to these draft articles (Convention) in so far as it is considered that effect can be given to such representations without detriment to their own interests."

pointed out that the privilege of holding and freely transferring funds and currency should be subject, on the one hand, to the functional needs of the organization in question, and on the other, to the provisions of the headquarters agreement. One member expressed surprise that the article should fail to include questions relating to customs duties and taxes.

460. Referring to the chapeau of the article, one member pointed out that it did not properly clarify which controls, inspections, etc. were involved - whether of the host State or of member States. With particular reference to subparagraph (b), one member noted that it did not specify whether an international organization could transfer funds in local currency when it was established in a host State whose currency was not convertible. In connection with subparagraph (c), one member wondered about the meaning of the expression "shall ... pay due regard to any representations" and about the kind of obligations involved. Other members thought that the subparagraph should refer not only to representations by member States of the organization, but also those by a host State that was not a member of the organization, as well as those by any non-member State which entered into relations with the organization as a result of a transfer of funds or currency.

461. Other members, referring to the reservations of some members about various aspects of the draft article, pointed out that it reproduced a similar provision of the 1946 Convention on the Privileges and Immunities of the United Nations and therefore seemed acceptable.

462. As for article 11, 295/ several members viewed it as unnecessary, since its content was covered by the subject-matter of article 4. One member also pointed out that article 11 might introduce an element of uncertainty in

---

295/ Article 11, as proposed by the Special Rapporteur, read as follows:

"Article 11

Notwithstanding the provisions of article 10, paragraphs (a) and (b), the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned."

the interpretation of article 10 and make it difficult to determine which "functional requirements" had to be taken into account for the purpose of limiting the provisions of article 10, paragraphs (a) and (b). He said that the fiscal independence international organizations ought to enjoy did not make it advisable to include article 11 in the draft.

463. On the other hand, another member found it useful to incorporate the article in the draft, provided the wording was amended, particularly the phrase "the scope of the rights accorded may be limited, in the light of the functional requirements of the organization", for, in his opinion, it could give the impression that the common régime established in article 10 failed to take account of the functional requirements criterion.

464. On completion of the discussion of the item, the Commission decided to refer articles 1 to 11, as proposed by the Special Rapporteur, to the Drafting Committee.

CHAPTER VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

465. The Commission, at its thirtieth session in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.

466. The Commission, from its thirty-second to its thirty-sixth session in 1984, received and considered five reports from the Special Rapporteur. 296/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

467. The Commission, at its thirty-sixth session, in 1984, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 297/ and a study prepared by the

---

296/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2, Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360, Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373, Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

297/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by intenational law". 298/

468. The Commission, at its thirty-seventh session, in 1985, appointed Mr Julio Barboza Special Rapporteur for the topic. The Commission received five reports from the Special Rapporteur from 1985 to 1989. 299/ At its fortieth session, in 1988, the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General provisions) and Chapter II (Principles). 300/

B. Consideration of the topic at the present session

469. At the present session, the Commission considered the Special Rapporteur's sixth report (A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only), and Add.1) at its 2179th, 2181st to 2186th and 2190th meetings.

470. In his sixth report, the Special Rapporteur examined further the possibilities of whether the obligations in respect of activities involving risk and those with harmful effects should be treated together or separately; offered another approach to the clarification of the concept of activities involving risk; introduced a set of revised procedural rules in respect of

---

298/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

299/ For the five reports of the Special Rapporteur, see Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394, Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402, Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405, document A/CN.4/413 and Corr.1 (English only) and Corr.2 (French only), and document A/CN.4/428 and Corr.1 and 2.

300/ For the text see Report of the International Law Commission on the work of its fortieth session, (Official Records of the General Assembly, Forty-third session, Supplement No. 10 (A/43/10)), p. 10, para. 22. Since then, further revisions have been made by the Special Rapporteur on those articles (see ibid. (A/44/10), p. 222, para. 311, and this report para. 471 infra).

activities with harmful transboundary consequences (Chapter III, articles 11 to 20); and all the substantive rules bearing on the question of liability (Chapter IV, articles 21 to 27 and Chapter V, articles 28 to 33), hence proposing a complete outline of a set of draft articles on the topic, as follows:

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of the present articles*

Article 2. *Use of terms*

Article 3. *Assignment of obligations*

Article 4. *Relationship between the present articles and other international agreements*

Article 5. *Absence of effect upon other rules of international law*

CHAPTER II. PRINCIPLES

Article 6. *Freedom of action and the limits thereto*

Article 7. *Co-operation*

Article 8. *Prevention*

Article 9. *Reparation*

Article 10. *Non-discrimination*

CHAPTER III. PREVENTION

Article 11. *Assessment, notification and information*

Article 12. *Participation by the international organization*

Article 13. *Initiative by the presumed affected State*

Article 14. *Consultations*

Article 15. *Protection of national security or industrial secrets*

Article 16. *Unilateral preventive measures*

Article 17. *Balance of interests*

Article 18. *Failure to comply with the foregoing obligations*

Article 19. *Absence of reply to the notification under article 11*

Article 20. *Prohibition of the activity*

CHAPTER IV. LIABILITY

Article 21. *Obligation to negotiate*

Article 22. *Plurality of affected States*

Article 23. *Reduction of compensation payable by the State of origin*

Article 24. *Harm to the environment and resulting harm to persons or property*

Article 25. *Plurality of States of origin*

Article 26. *Exceptions*

Article 27. *Limitation*

CHAPTER V. CIVIL LIABILITY

Article 28. *Domestic channel*

Article 29. *Jurisdiction of national courts*

Article 30. *Application of national law*

Article 31. *Immunity from jurisdiction*

Article 32. *Enforceability of the judgement*

Article 33. *Remittances*

471. The Special Rapporteur indicated that his intention in proposing an almost complete set of draft articles was to facilitate concrete discussion of the approach and the scope of the topic, as well as of specific draft articles and the principles to be reflected therein. The new articles were only an outline of the subject; they were put together with the purpose of giving the Commission a panoramic view of the topic as well as the possible interrelation between the different provisions, so that the manner in which the main ideas behind the texts acted within a hypothetical set of articles could be seen. Except for article 2, which was considerably changed due to further clarification of the concept of risk, the Special Rapporteur had kept articles 1 and 3 to 9 basically in the form in which they had been referred to the Drafting Committee. He felt that all the pertinent comments which were made on these articles in the Commmission or in the Sixth Committee of the General Assembly should be taken up by the Drafting Committee. In the sixth report, the Special Rapporteur also examined the possibility of extending the topic to include harm to areas beyond national jurisdiction of States or the so-called "global commons".

472. The sixth report raised some complex policy and technical issues and introduced 33 articles. Many members of the Commssion felt that they needed

more time to reflect on the issues raised in the report and were able to make only tentative remarks. The Commission therefore decided to come back to the issues raised in the sixth report at its next session.

1. General approach and scope

(a) Activities involving risk and activities with harmful effects

473. In response to some requests made in the last session of the Commission and in the Sixth Committee of the General Assembly, the Special Rapporteur again examined the possibilities of separate treatment in the topic of activities involving risk and those involving harm. His further examination of this issue had led him again to the conclusion that the two kinds of activities had more features in common than distinguishing features. The similarities were sufficient enough to allow examining their consequences in a similar manner under a single régime. He pointed out that a number of recent legislative efforts related to the same type of problems had also opted for dealing with these activities together. 301/ The separate treatment of these two types of activities was not, however, without precedent. 302/ The differences between the two approaches in fact were in the sphere of prevention. The Special Rapporteur noted that the obligation of prevention could be interpreced in two ways: one was to take measures prior to the occurrence of any accident in order to prevent that accident from happening, and the other was to take measures either after the occurrence of any accident to reduce the scope and the degree of harm, or to take measures to mitigate,

---

301/ For example the draft rules on compensation for damage to the environment prepared by the Council of Europe dealing with dangerous activities also covered activities causing harm as a result of continuous pollution, without apparently differentiating between the legal treatment accorded to them (see document CDCJ (89) 60, Strasbourg, 8 September 1989).

302/ The legal principles and recommendations on environemntal protection and sustainable development drawn up by the Experts Group on Environmental Law of the World Commission on Environment and Development made distinctions between activities creating a risk of substantial transboundary harm and those which actually caused substantial transboundary harm. Environmental Protection and Sustainable Development, Legal Principles and Recommendations (1986), adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development.

contain or minimize the transboundary harm in respect of activities with harmful effects. The first meaning of "prevention" applied to activities involving risk, the second mainly to activities with harmful effects. While the Special Rapporteur was prepared to follow the wishes of the Commission, he was meanwhile inclined to follow the first approach with modification and to propose the establishment of a régime for both types of activities in which there was a need for notification, information and consultation between the States concerned. However, the so-called "hard" obligations arose only when harm had occurred and could be imputed to an activity by a causal link. It was reasonable to expect States to inform, consult and negotiate with one another in respect of such activities affecting them. As regards liability, he was still inclined to recommend the obligation to negotiate compensation for harm caused rather than automatic strict liability.

474. Most members agreed with the Special Rapporteur that it would be preferable to consider activities involving risk and those involving harm together since they had a lot in common in terms of legal consequences. This was particularly so if one took a broader concept of prevention to include not only measures to prevent an accident, but also measures designed to reduce or prevent harm. A few members, while not disagreeing with the approach, were not certain how obligations of prevention, particularly those intending to prevent the occurrence of an accident, could be formulated in a set of articles which made no distinction between the two types of activities. The obligations of prevention were quite distinct. They also preferred not to refer to the measures taken to mitigate and reduce harm after the occurrence of an accident as preventive. It was also felt that the draft could be divided into two parts; the first part could be devoted to prevention and the second part could consist of one or several model clauses on reparation.

475. A few members felt that the Special Rapporteur, in an attempt to treat activities involving risk and those involving harm together, had tended to narrow the scope of the topic so as to almost subordinate activities involving harm to those involving risk. Thus, activities causing harm appeared to have a different meaning - an activity in which harm was seen as an inevitable or virtually inevitable consequence from the beginning and could be undertaken and continued on the basis that measures would be taken to reduce the harm and

TD

compensation would be paid for such harm as did occur. This meaning emerged particularly from the definition of "activities with harmful effects" in article 2 (f). If the definition of activities with harmful effects failed to include activities which caused harm although the risk of harm was not anticipated, the scope of the topic would have been considerably narrowed and that was already rejected by most members of the Commission at previous sessions. Another narrowing element, according to this view, was the list of dangerous substances. 303/

476. A few members maintained the view that the topic should build upon the concept of risk and not harm. It was the concept of risk which imposed certain obligations of prevention on States, and transboundary harm normally would not occur unless there was a risk in an activity. This approach, in their view, was a more commonly accepted practice. They felt it would be unrealistic to expect States to accept responsibility for any transboundary harm of any activities whether or not they posed a risk of causing such harm.

477. A few members felt that, despite the Special Rapporteurs' suggestions, it might be more appropriate to treat activities involving risk and those causing harm in separate chapters.

(b) Further clarification of scope

478. During the last debate in the Commission and in the Sixth Committee of the General Assembly comments were made by a few members and Governments about the further clarification of the scope of the topic by having a list of activities covered by the topic. The Special Rapporteur explained that he had not reached a different conclusion, after further examination of the matter, and that he still believed that a list of activities was inappropriate for a global convention of the nature anticipated for the topic. He, however, was well aware of the concern which had been expressed for the need of further clarity in the scope of the topic, specifically about the type of activities with respect to which the articles of the topic applied. To that end, he had explored the possibility of listing, not activities, but substances which

---

303/ Comments on the list of dangerous substances is discussed below in paras. 478 to 483.

were inherently dangerous so that certain activities relating to them would most likely carry the risk of causing transboundary harm. This model was followed by a draft prepared by the Committee of Experts for the European Committee on Legal Co-operation of the Council of Europe 304/ on civil liability for dangerous activities. Dangerous activities in that draft were defined in relation to the concept of dangerous substances, a list of which was annexed to the rules, and what was done with such substances: namely handling, storage, production, unloading and similar operations. That draft also included activities using technologies which produced hazardous radiation, the introduction into the environment of dangerous genetically altered organisms or dangerous micro-organisms, etc. The draft defined dangerous substances as those which created a significant risk of harm to persons or property or the environment, such as flammable and corrosivematerials and explosives, oxidants, irritants, carcinogens and toxic, ecotoxic and radiogenic substances as indicated in an annex. The Special Rapporteur felt that this model was perhaps better for a global convention than a list of activities since it offered greater flexibility and yet allowed considerable precision in the scope of the topic. He therefore was inclined to propose that model to the Commission. Of course, such a list would have to be put together in consultation with a group of experts and would not be exhaustive because it always remained to be seen if the risk of transboundary harm presented by that particular activity was real. Such a list would also require some changes in articles 1 to 9 now before the Drafting Committee.

479. As regards the list of dangerous substances, three general views emerged from the debate in the Commission: some members welcomed the list of substances in the manner it was proposed; other members approved of it only if such a list would be exhaustive; and yet other members did not agree with formulating any list.

304/ Document CDCJ (89) 60.

480. According to the first view, the list of dangerous substances helped to clarify the scope of the article further, since it gave examples of the types of substances and eventually the activities related to them. Such a list in their view, without departing from the general approach of the topic, provided additional clarity to the concept of risk. With the list as such, the notion of risk was associated with the types of activities for which preventive measures were to be taken. Such a list should not, as the Special Rapporteur had stated, be exhaustive but only illustrative and be updated whenever necessary.

481. According to the second view, the whole purpose of having a list, whether of activities or substances, was to clearly state the scope of the topic so that States knew exactly in respect of what activities or substances they must comply with the obligations set forth in the articles. A non-exhaustive list, or an illustrative list, would defeat that purpose. Such a list was of value only if it was exhaustive. A few of the members who expressed this view were those who originally preferred a list of activities covered by the topic.

482. According to the third view, establishing a list, whether or not exhaustive, would tend to narrow the scope of the topic and would also tend to shift the emphasis in the topic from liability on the basis of causing harm to that on the basis of conducting activities involving risk. According to this view, risk should play no role in compensation; otherwise it would be incompatible with the principle that the innocent victim should not be left alone to bear the loss. According to this view, the concept of risk was only relevant to obligations of prevention and for that there was no need to have a list; a general definition of risk would suffice.

483. In summarizing the debate, the Special Rapporteur noted that his intention in proposing a list of dangerous substances was only to give more precise meaning to the concept of "significant risk" for activities involving risk. The list of dangerous substances did not apply to activities with harmful effects. He did not believe such a list would have any impact on the scope of the topic. Nor did he feel that an "exhaustive" list would automatically determine that an activity was one involving a "significant risk of transboundary harm". An assessment of the risk was always necessary:

many factors had to be taken into account. A dangerous substance might cause risk of harm in the territory of the State of origin, but not transboundary harm when it was located too far from the borders of the neighbouring State; or a dangerous substance might be used in such a small quantity that it would not pose a risk of any transboundry harm. Therefore, regardless of whether the list was purported to be exhaustive, there must always be an assessment of the risk taking into account the circumstances in which a substance was being used.

2. Chapters and articles included in the outline proposed by the Special Rapporteur

(a) Chapter I. General provisions

Article 1. Scope of the present articles and Article 2. Use of terms [305]

484. The Special Rapporteur mentioned that a list of dangerous substances would require changes in article 2. Subparagraph (a) described activities involving risk. Subparagraphs (b) to (d) introduced the notion of dangerous

---

[305] Articles 1 and 2 of the proposed outline read as follows:

"CHAPTER I. GENERAL PROVISIONS

"Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried out in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create a risk of causing, transboundary harm throughout the process.

"Article 2. Use of terms

For the purposes of the present articles:

(a) 'Activities involving risk' means the activities referred to in article 1, including those carried out directly by the State, which:

(i) Involve the handling, storage, production, carriage, unloading or other similar operation of one or more dangerous substances;

(ii) Use technologies that produce hazardous radiation; or substances. These paragraphs would eventually have to be drafted in consultation with experts. Some other changes were introduced to article 2 in the light of last year's comments in the Commission and in the General Assembly. Subparagraph (g) on "transboundary harm" had been revised to include the concept of preventive measures taken after an accident had

---

(iii) Introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

(b) 'Dangerous substances' mean substances that present a[n appreciable] [significant] risk of harm to persons, property, [the use or enjoyment of areas] or the environment, for example, flammable and corrosive materials, explosives, oxidizants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in the annex ... A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of the preceding paragraph;

(c) 'Dangerous geneticaly altered organisms' means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombination, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in the annex ...;

(d) 'Dangerous micro-organisms' means micro-organisms that create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms that produce toxins;

(e) '[Appreciable] [Significant] risk' means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm;

(f) 'Activities with harmful effects' means the activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

(g) 'Transboundary harm' means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use of enjoyment of areas] or the environment. In these articles, the term always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to occurred in the case of activities involving risk or, in the case of activities with harmful effects, to minimize harm. Such measures, in the Special Rapporteur's view, if taken by the affected State in order to protect itself and its citizens, should be treated as part of harm to that State. One more significant change in the definition of transboundary harm in subparagraph (g) was the inclusion of harm to the environment apart from harm to persons and property. In the Special Rapporteur's view, reparation for harm to the environment must be made by restoring the conditions which existed prior to the occurrence of the harm, and the cost of such operations must be borne by the State of origin if they were carried out by the affected State or by a third party at its request. If it was not possible to return to the _status quo ante_, the monetary value of the impairment suffered should somehow be

---

contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;

(h) '[Appreciable] [Significant] harm' means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

(i) 'State of origin' means the State which exercises jurisdiction or control over the activity referred to in article 1;

(j) 'Affected State' means the State under whose jurisdiction or control the transboundary harm arises;

(k) 'Incident' means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

(l) 'Restorative measures' means appropriate and reasonable measures to restore or replace the natural resources that have been damaged or destroyed;

(m) 'Preventive measures' means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures which attempt to contain or minimize the harmful effects of an incident once it has occurred;

(n) 'States concerned' means the State or States of origin and the affected State or States."

estimated and the affected State be compensated with an equivalent sum, or with such other compensation by the State of origin as was negotiated between the parties concerned. Subparagraph (h) attempted to give a brief definition of "appreciable [significant]" harm. The Special Rapporteur stated that he was open to suggestions in this regard. He had also attempted to define the concept of "incident" in subparagraph (k). He had preferred the expression "incident" to "accident" to include both conditions when things were beyond the operator's control and when the injurious effects arose in the normal course of a matter of an activity and was somehow linked to it. Subparagraph (m) introduced the two aspects of the concept of prevention, namely those measures taken to prevent the occurrence of an incident of harm and those intended to minimize harm.

485. There were few comments on article 1. Some were made in reference to the general scope of the topic which was covered earlier (paras. 478-483 above). A few comments were also made to the effect that, in terms of structure, article 1 did not seem to incorporate the very many changes which were made in article 2 on the definition of activities involving risk and those involving harm. Article 2, on the other hand, was extensively discussed. Some members felt the new text of article 2 was too long and too complex for definitions of terms. It had introduced 14 definitions, some of which were not self-contained and in turn had to rely on further definitions. Perhaps the definition of some of the terms could be separated and introduced as independent articles. Some other members did not see much difficulty with a long list of terms defined in article 2 at this early stage of the work since, as the work on the topic progressed, the list of terms could be shortened if they proved unnecessary. The Special Rapporteur, in summarizing the report, noted that the topic dealt with a new field and obviously many terms used in the articles were not widely known and should therefore be defined. Conventions on related subjects all had long lists of terms defined.

486. Some members commented that the definition of the term "activities involving risk" in subparagraph (a) relied on four separate concepts: "dangerous substances", "technologies that produce hazardous radiation",

"dangerous genetically altered organism" and "dangerous micro-organisms". Any activity which was not related to one of those four elements even if, objectively speaking, it might be the cause of transboundary harm - for instance, the construction or operation of a dam - would apparently be excluded from the definition, and would not therefore be considered an activity involving risk. The definition should therefore be reconsidered.

487. It was also pointed out that the definition of "activities with harmful effects" was perhaps narrowly construed and it was uncertain whether it also included the effects of activities which caused harm although the risk of harm was not anticipated. It was further mentioned that the relationship between this type of activities and article 2 should be clarified, since that article made no reference to such activities. As regards the term "transboundary harm" in subparagraph (g), many members welcomed the fact that that concept now included harm to the environment, as well as the cost of preventive measures taken to contain or minimize transboundary harm. As regards the choice between the two qualifiers "appreciable" or "significant" to set the threshold for harm, many members preferred the expression "significant". As regards the term "incident", some members expressed preference for the expression "accident" in activities involving risk which they felt was more commonly used. As for the definition "restorative measures" in subparagraph (f), a comment was made that the cost of such measures should also be included in the expression "transboundary harm". It was felt that in the concept of "preventive measures" a clearer distinction should be made between those measures taken to prevent an accident and those taken to minimize harm. The latter could perhaps be referred to as a measure to mitigate harm. Some members also suggested that perhaps the concept of damage should not be defined in article 2, but be the subject of a separate article; many precedents already existed in that regard. Particularly in the context of this topic where damage was intended to include damage to the environment, persons and property, preventive measures etc., it might be better to have a separate article allocated to such a definition.

Article 3. Assignment of obligation,

Article 4. Relationship between the present articles and other international agreements and

Article 5. Absence of effect upon other rules of international law 306/

488. The Special Rapporteur had not proposed changes in these articles. None of the articles was extensively discussed, although a few members felt the title of article 3 was unclear and that it should be made plain in the article that if liability was to be established, the State of origin must be fully aware of the potential risk of the activity and must have some control over it. One member also expressed uncertainty about the compatibility of article 4 with article 30, paragraph 3 of, the Vienna Convention on the Law of Treaties.

306/ Articles 3, 4 and 5 of the proposed outline read as follows:

"Article 3. Assignment of obligations

The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.

Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in the preceding paragraph."

"Article 4. Relationship between the present articles and other international agreements

Where States parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply, subject to that other international agreement."

"Article 5. Absence of effect upon other rules of international law

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act."

(b) Chapter II. Principles

489. The Special Rapporteur did not propose substantive changes in articles 6, 7, 8 and 9. [307] Only article 8, he stated, would have to be revised to include the broader definition of prevention, namely those measures which also had to be taken in order to minimize the harmful effects of an

---

[307] Articles 6, 7, 8 and 9 of the proposed outline read as follows:

"CHAPTER II. PRINCIPLES

"Article 6. Freedom of action and the limits thereto

The sovereign freedom of States to carry out or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

"Article 7. Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organization that might be able to help them, in trying to prevent any activities referred to in article 1, carried out in their territory or in other places under their jurisdiction or control, from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places [areas] under its jurisdiction or control.

"Article 8. Prevention

States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of such activities. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

"Article 9. Reparation

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in these articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm."

activity. As for article 9, the Special Rapporteur suggested qualifying the obligation of the State of origin by stating that "the State of origin shall ensure that [compensation] [reparation] is made" and to replace the words "the State of origin and the affected State or States" by "the parties" in order to include cases where individuals other than States were involved, such as in cases of civil liability. Articles 6 and 7 were not extensively discussed, except that a few members felt that their drafting could be improved. In article 7, the comment was made that while it was useful to call on assistance from international organizations, there might not be such organizations competent to intervene.

490. As regards article 8, while some members found it generally acceptable, a few others did not agree with the inclusion of the broader concept of preventive measures to include those designed to minimize harmful effects. A comment was also made to the effect that the article was not sufficiently stringent and that there should at least be a requirement for compliance with safety measures. To that end, the phrase "in so far as they are able" should be deleted.

491. As regards article 9, it was pointed out that the article should include also the concept of "restorative measures", at least where the affected State so permitted. While a few members were not satisfied that the article fully reflected the concept of civil liability, some others felt, with the proposed revisions suggested by the Special Rapporteur, that the article was sufficiently flexible to allow for settlement of issues of reparation between private parties also without direct involvement of States.

Article 10. Non-discrimination [308]

492. In order to ascertain the views in the Commission, the Special Rapporteur proposed a new article on non-discrimination in Chapter II. He noted that

---

[308] Article 10 of the proposed outline read as follows:

"Article 10. Non-discrimination

> States parties shall treat the effects of an activity that arise in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1."

this principle was not unknown in channelling claims in respect of transboundary harm in Europe. Under this principle, foreign individual claimants were given access to domestic courts and channels of the State of origin on an equal footing with domestic claimants. This principle was without prejudice to the fact that a minimum international standard might be required of a State of origin which was higher than that established by its domestic law. This minimum standard, the Special Rapporteur noted, was particularly important in view of the fact that, with the exception of some well-integrated States in a few regions, the domestic law standards varied considerably. This principle also implied that States must provide remedies, in their domestic law, for the type of harm contained in these articles. Otherwise, there would be no use to have access to domestic courts of a State of origin whose domestic law did not provide for any remedy.

493. Many members welcomed article 10. They felt that such an article was essential in the operation of the civil liability régime where injured parties would be given access to courts of the State of origin. Some, however, wondered about the acceptibility of the article in a global convention as such. As the Special Rapporteur himself had noted they were not certain how the article would deal with the considerable diversity in domestic laws about damage caused as the result of the type of activities covered by this topic. Hence they felt that further reflection was necessary.

(c) Chapter III. Prevention

494. The Special Rapporteur had also revised the procedural rules on measures of co-operation and of prevention, in order to make them simpler and more flexible. Most members, while welcoming the more flexible procedural rules to secure preventive measures, were not certain that the articles of the chapter sufficiently took into account all types of activities covered by the topic. It appeared that the articles were basically designed to apply to planned activities. It seemed unclear how the obligations of preventing transboundary harm were to apply to activities which were not planned. This was perhaps one of the drawbacks of formulating preventive obligations entirely in terms of

procedural rules. Several members also pointed out that, in general, the obligations of States under the provisions of this chapter of the draft were not very stringent and often less exacting than their obligations under positive law.

Article 11. Assessment, notification and information and
Article 12. Participation by the international organization [309]

495. Article 11 set forth the general duty of States to assess, notify and inform in case of certain activities which cause or create the risk of causing

---

[309] Articles 11 and 12 of the proposed outline read as follows:

"CHAPTER III. PREVENTION

"Article 11. Assessment, notification and information

> (a) If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried out under its jurisdiction or control, it shall review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.
>
> (b) If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in the preceding paragraph.

"Article 12. Participation by the international organization

> Any international organization that intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster co-operation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make to it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State that requests such assistance in relation to the matter which prompted its intervention."

transboundary harm. Even though this duty had been relatively well established in State practice, the Special Rapporteur stated that, in his view, it had not become a firm obligation whose breach would incur sanctions. With regard to activities involving risk, the introduction of a list of dangerous substances, the Special Rapporteur felt, narrowed and made more precise the duty of States in respect of article 11. Where there was more than one State which might be affected by the extraterritorial effect of such activities and it would be difficult to identify them, the State of origin had to call in for assistance an international organization competent in that area and supply it with the relevant information. The State of origin may forego the duties created by article 11, but naturally it would have to pay the corresponding compensation if transboundary harm occurred, and that compensation should be negotiated with the affected State in the terms of articles 21 and 23. Article 12 intended to provide a framework within which international organizations could function in accordance with article 11 (b).

496. Most members found the participation by international organizations in facilitating the obligations of prevention positive and useful. Particularly the technical assistance that these organizations could provide to developing countries would be significant and necessary. Some members wondered about the existence of such competent international organizations. Some doubts were also expressed about how international organizations could become involved in the resolution of the issues raised under this topic. International organizations could only operate under their own charter and mandate and many of them would not be authorized to perform the functions that were anticipated for them in these articles. Besides, these organizations might not be able to extend their assistance to non-members. Then, there was the question who should pay the expenses incurred by international organizations in the case of their participation. Hence, more thought should be given again to the role of international organizations in the context of this topic.

Article 13. Initiative by the presumed affected State,

Article 14. Consultations,

Article 15. Protection of national security or industrial secrets and

Article 16. Unilateral preventive measures 310/

497. The Special Rapporteur stated that article 13 was intended to give an opportunity to a State that was affected by an activity in another State to put in motion the procedure purported to create a régime for that activity.

310/ Articles 13, 14, 15 and 16 of the proposed outline read as follows:

"Article 13. Initiative by the presumed affected State

If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (c), or creating a [appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of the preceding article. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State.

"Article 14. Consultations

The States concerned shall consult among themselves, in good faith and in a spirit of co-operation, in an attempt to establish a régime for the activity in question that takes into account the interests of all parties. At the initiative of any of these States, consultations may be held by means of joint meetings among all the States concerned.

"Article 15. Protection of national security or industrial secrets

The State of origin shall not be bound by the provisions of article 11 to provide data and information that are vital to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall co-operate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

"Article 16. Unilateral preventive measures

If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal régime for that activity among the States concerned, the State of origin shall

Such a potentially affected State could request the State of origin to comply with article 11. The request should be accompanied by a technical and documented explanation setting forth the reasons for such belief. Under article 13 if the activity in question happened to be one of those covered by article 1, the State of origin shall bear the costs incurred by the affected State.

498. The Special Rapporteur stated that consultations in good faith were essential to régimes of this nature. Article 14 was simply obligating States, once finding themselves within the scope of these articles, to negotiate in good faith and in the spirit of co-operation in order to agree on a régime for the activity which adequately took care of their interests. Article 15 was designed, in addition to protecting the potentially affected States, to respect the essential interests of the State of origin in matters of national security and industrial secrets. While the State of origin was not obliged to disclose information, it was expected to negotiate in good faith with potentially affected States and take their interests into account. The Special Rapporteur noted that similar ideas had been incorporated in recent legislative attempts of a similar nature. 311/ Article 16 reiterated the obligation of the State of origin to take unilateral measures to prevent transboundary negative consequences of activities being conducted under its

---

> take appropriate preventive measures as indicated in article 8, in particular, appropriate legislative and administrative measures including: requiring prior authorization for the conduct of the activity and encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident that has already occurred and that presents an imminent and grave risk of causing transboundary harm."

311/ For example, in an OECD Council resolution on principles concerning trans-frontier pollution, Recommendation C (74) 222 of 14 November 1974, reprinted in OECD, OECD and the Environment (1986), quoted in document A/CN.4/406, para. 78. See also, Principle 6 of UNEP's Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources shared by two or more States (UNEP/IG.12/2, annexed to UNEP/GC.16/17).

jurisdiction or control, until such time that an agreement had been reached about similar matters with the potentially affected State. Such unilateral measures included the requirement of prior Government authorization for conducting such activities, compulsory insurance or other financial guarantees to cover possible damages, as well as measures of mitigating damage in case the harmful effects of the activities begin to appear.

499. Articles 13 to 16 were not extensively discussed. It was noted that article 13 was not quite clear and article 16 was too complex. While a few members supported the retention of article 16, a few others preferred its deletion. A comment was made that article 16 was a specific application of the general obligation of due diligence and of article 8. Since it was unrealistic to expect States to formulate a régime for each activity, article 16 imposed on them the obligation of taking unilateral preventive measures. However, the measures that the State of origin must take in article 16 were not sufficiently stringent.

Article 17. Balance of interests [312]

500. In view of the interest expressed during the debate in the Commission and in the Sixth Committee of the General Assembly about providing some guidelines

---

[312] Article 17 of the proposed outline read as follows:

"Article 17. Balance of interests

In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, these States may, in their consultations or negotiations, take into account the following factors:

(a) Degree of probability of transboundary harm and its possible gravity and extent, and likely incidence of cumulative effects of the activity in the affected States;

(b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

for States in negotiating a régime in respect of activities covered by these articles, the Special Rapporteur had proposed article 17. This article intended to give some content to the concept of balance of interests. The factors listed in this article should be taken into account in order to balance the interests of the parties involved in such cases. These factors mostly reflected those originally indicated in Section 6 of the Schematic outline. The Special Rapporteur stated that, even though he saw certain advantages in having such guidelines, he was however concerned that such guidelines were not truly legal norms and hence they might be inappropriate for inclusion in these draft articles. He was, however, aware that the incorporation of such guidelines in a legal instrument was not novel.

(e) Economic viability of the activity in relation to possible means of prevention;

(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

(h) Benefits which the State of origin or the affected State derive from the activity;

(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) Extent to which assistance from international organizations is available to the State of origin;

(m) Applicability of relevant principles and norms of international law."

Article 7 of the draft articles on the law of the non-navigational uses of international watercourses had also listed factors which constituted "equitable and reasonable" utilization of waters in an international watercourse. Due to the non-normative nature of these factors, he had drafted the article in permissive and not obligatory language. Besides, the relevance of these factors, he maintained, depended on the particular case.

501. Many members felt that article 17 was a commendable effort to produce a list of interests to be taken into account. There was solid support in State practice for the use of the balance of interests approach. Such a list could be of assistance to States in negotiating a régime. There were, however, divergent views among these members about how these factors and the concept of balance of interests fit into the obligations in the preceding and subsequent articles. For example, it was wondered whether this concept was relevant only to setting up a régime to prevent transboundary harm, or also relevant with respect to reparation and liability, in particular with respect to articles 9 and 21. 313/ A few members, questioning the legal nature of the list in article 17, felt that it could be annexed to the articles since they were only guidelines and had no normative value.

Article 18. Failure to comply with the foregoing obligations, Article 19. Absence of reply to the notification and Article 20. Prohibition of the activity 314/

502. It was the Special Rapporteur's understanding from last year's discussion in the Commission and in the Sixth Committee of the General Assembly that the

---

313/ Comments on the interrelationship between articles 17 and 21 are covered under article 21 below (paras. 511 and 512).

314/ Articles 18, 19 and 20 of the proposed outline read as follows:

"Article 18. Failure to comply with the foregoing obligations

Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings, unless this is provided for in other international agreements in effect between the parties. If, in these circumstances, preferred view was that non-compliance with obligations of prevention, and particularly with procedural obligations, should not constitute grounds for a cause of action by the potentially affected State. In his view, however, certain important consequences should be attached to compliance with procedural obligations to at least induce States to do so. Otherwise, there would be no incentives for States to take preventive measures. Article 18, therefore, tried to strike a certain balance. Non-compliance with this article would deprive the State of origin of the right to invoke article 23 on the reduction of compensation payable to the affected State, in case of transboundary harm caused by that activity.

503. Some members who addressed the article had difficulties with its basic structure and one member expressed reservation about the very principle expressed in the article. In their view, article 18 could not deny a right of action for the affected State that might exist outside these articles under customary international law. The article, they felt, should therefore be revised. A few from among these members were also concerned that article 18 had perhaps gone too far and in its current form reduced considerably the

---

the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23.

"Article 19. Absence of reply to the notification under article 11

In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory; this period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it.

"Article 20. Prohibition of the activity

If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives."

obligation of prevention under article 8. There should perhaps be some more significant consequences for failure to comply with procedural obligations. The Commission, according to this view, should create a régime containing obligations that gave rise to international responsibility in the event of a breach. The obligations of consultations, notifications, etc. must be at least as strict as those in the 1982 United Nations Convention on the Law of the Sea. A breach of such obligations, as it had become clear in the State responsibility topic (A/CN.4/429), did not always entail pecuniary compensation; perhaps nominal damages or other forms of satisfaction could apply.

504. In summarizing the debate, the Special Rapporteur felt that there seemed to be uncertainty in the Commission as to the role which the obligations of prevention should play in this topic. If the obligations of prevention were to be more stringent, i.e. if their breach would lead to State responsibility, then the topic would be dealing with wrongful acts, not with acts not prohibited by international law. Of course, that could be remedied if in the title of the topic "activities" replaced "acts". In that case, if States did not comply with the obligations incumbent on them, such as imposing certain obligations of prevention on private parties conducting, under their jurisdiction or control, activities of article 1, they would be obligated to pay compensation for transboundary harm.

505. As for article 19, the Special Rapporteur stated that it provided a reasonable time within which the State that had been notified had to reply. He had recommended a period of six months. If during that time the notifying State did not receive any reply, it would be considered that the notified State had agreed that either the activity was not going to cause transboundary effects or that measures of prevention indicated by the notifying State were sufficient to prevent possible transboundary harm. In case a notified State was a developing country, technical assistance to evaluate the information received from a notifying State might be forthcoming from relevant international organizations. A few members commented on article 19. They expressed reservations about the assumption that non-reply by the potentially affected State should amount to acquiescence. They also suggested that a "six months" period of reply be replaced by a "reasonable time".

506. Regarding article 20, the Special Rapporteur explained that there might be circumstances in which a proposed activity would have such transboundary harmful consequences which could not be avoided or even adequately compensated for, such as in cases of irreversible environmental harm. It was only fair and reasonable that those activities should not be permitted to be conducted. Once it could be demonstrated that the activity in question had been modified and would not cause unreasonable risk of transboundary harm or such harm could be adequately compensated for, permission would be granted. This article, the Special Rapporteur said, was intended to set a limit and provide a threshold beyond which an activity could not be conducted.

507. Those members who spoke on this article welcomed the general idea which it put forward. Their views, however, differed as to how a threshold on such activities could be placed. For a few, the article functioned as an injunction, pending satisfactory preventive measures. For some others, the article should be couched in stronger terms, since a qualified prohibition would merely undermine the efficiency of prevention. According to this view, once it was clear that an activity would cause such serious and irreversible transboundary harm, there should be no hesitation in requiring its ban until necessary preventive measures were taken. This approach, in their view, was only fair. One member, however, felt that article 20 should apply only in respect of those activities which posed a high probability of causing disastrous transboundary harm. According to this view, the obligation of the State of origin should be clarified; namely whether it should refuse authorization to conduct the activity, or should also withdraw authorization. Thus the relationship between this article and the civil liability régime introduced in Chapter V should be further clarified. For example, it should be more clear whether the ability to pay compensation, under article 20, referred to that of a State or the operator. Another member felt that the obligation of banning an activity of this nature should be reciprocal; the other State should also agree not to conduct similar activities in its territory.

(d) Chapter IV. Liability

508. This chapter, the Special Rapporteur explained, intended to elaborate in specific articles the concept of liability, which as a principle was introduced in article 9 on "reparation". Accordingly, liability would be incurred in case of transboundary harm, regardless of any preventive measures which the State of origin might have taken. The only difference was in the amount of compensation. In the Special Rapporteur's original view the concept of reparation in the articles did not entirely correspond to the classical one as used in the State responsibility topic. Under these articles, reparation did not amount to total restitution since deductions were permissible. Such deductions would contemplate, for example, costs of preventive measures taken specifically for the benefit of the affected State, or the extent to which the affected State might also have benefited from that activity, etc. The Special Rapporteur felt that considering that the present articles were intended to apply to a wide range of activities, one could not possibly in advance envisage all circumstances which would affect the measure of damages in every particular case. Besides, the purpose of these articles, he stated, was to provide guidelines for States in negotiating a régime in respect of an activity covered by article 1, and also to provide a safety net to protect the affected State in the absence of such an agreement. These articles were designed on the basis that States, in so far as possible, would negotiate the amount of compensation. If the State of origin refused to negotiate the matter or refused to pay the agreed compensation, only then would the State incur responsibility for wrongful acts.

509. Many members agreed that this chapter formed the central core of the topic. Two basic issues in this chapter were considered to be of particular importance: first the obligation to pay compensation for transboundary harm and, secondly, the determination of the liable party, namely whether the State of origin or the operator should be held liable. As regards the first point, many members felt that the chapter should have been begun with a clear statement on the obligation to pay compensation, rather than what the articles do presently, namely to stress the obligation to negotiate compensation. Negotiation was only a modality by which disputes regarding compensation could

be settled. Substantive rights and obligations on liability and compensation should be set forth clearly. Some members also questioned the existence in present international law of an obligation for reparation in the absence of any breach of international law. Although accepting that such an obligation could be envisaged, they stressed that this would be a considerable innovation. As regards the second point, namely who is the liable party, some members strongly opposed the primary liability of the State of origin. In their view, the operator should be held liable, a proposition that was compatible with contemporary State practice. It was only in the Convention on International Liability for Damage Caused by Space Objects that the State of origin was liable for transboundary damage of its activities. That Convention was, however, of a special nature and could not be generalized. In other conventions, operators were held strictly liable but States were held responsible only to the extent that they did not adopt proper domestic legislation for the safe operation of the activities with which the operators should have complied. A few other members disagreed with this view. They felt that the State should be held primarily liable, because it alone had control and authority in its territory to organize its domestic affairs and make certain that activities conducted in its territory did not cause harm to other States. Other members felt that States should bear some liability for activities within their territories with extraterritorial effects. They felt it was unfair to allow States to avoid liability by hiding behind the operators.

510. In summarizing the debate, the Special Rapporteur noted that there was a division of views in the Commission as to how the question of liability should be settled as between the operator and the State of origin. He agreed that international practice regarding liability and compensation undoubtedly pointed to the private party, whether operator, owner, carrier, etc., as the subject of such obligations. States sometimes bore a residual liability for the amounts not covered by the said private party. He felt, in order to formulate articles on liability, that there should be a decision on who should bear primary liability for transboundary harm. He invited the Commission to address this issue more extensively at the next session.

Article 21. Obligation to negotiate,
Article 22. Plurality of affected States and
Article 23. Reduction of compensation payable by the State of origin [315]

511. Article 21, the Special Rapporteur stated, reiterated the principle of negotiation in good faith in respect of resolving problems derived from causing transboundary harm. The article thus directed the parties to negotiate for compensation bearing in mind that in principle harm should be

---

[315] Articles 21, 22 and 23 in the proposed outline read as follows:

"CHAPTER IV. LIABILITY

"Article 21. Obligation to negotiate

If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated.

"Article 22. Plurality of affected States

Where more than one State is affected, an international organization with competence in that area may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their co-operation. If the consultations referred to in article 14 have been held and if an international organisation has participated in them, that same organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a régime for the activity that caused the harm.

"Article 23. Reduction of compensation payable by the State of origin

For claims made through the diplomatic channels, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [for example, if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried out in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm]."

fully compensated. The language, however, was chosen so as to allow considerations of balancing of interests to play a role in the amount of compensation. Those considerations were stipulated in article 23.

512. Some members reiterated the view that this article should simply state the obligation to pay compensation. They felt the qualifying phrase "in principle" weakened the article and should therefore be deleted. These members also saw an inconsistency in the language of the article which seemed to have attempted to combine balancing interests with the principle of full compensation. The two concepts would not go together. Compensation determined on the basis of balance of interests might never be full. The article should therefore reflect a choice. An alternative would be to begin with an article indicating the principle of full compensation, to be followed by another article which would indicate circumstances in accordance with which compensation must be reduced. This approach would perhaps bring more appropriately the concept of balance of interests into liability and compensation without denying the principle of full compensation. One member found the article, as drafted, appropriate since it presumed that the State of origin itself had also suffered damage and was thus innocent. Another member did not agree with the principle of full compensation. In his view, such a principle was not supported by State practice. The principle of full compensation confused this topic with State responsibility which also called for full compensation. What were then the differences in terms of consequences between this topic and State responsibility? Another member also wondered about the real difference between the two topics since in his view the liability envisaged in the present topic increasingly eclipsed, in practice, by the implementation of rules normally applicable in case of responsibility for failure to comply with an obligation. A few members felt that some thought should be given to setting a ceiling on compensation. A few other members opposed that idea and found it unfair and impractical considering the fact that the topic applied to so many different activities with different levels of consequences. Those members who preferred that liability should be placed primarily on the operator felt the article should be revised to introduce that idea.

513. The purpose of article 22, the Special Rapporteur stated, was to facilitate the obligations of negotiation embodied in the previous article where there was more than one affected State. The Special Rapporteur felt that international organizations could play a role in this process through their good offices and helping to resolve the problems among States concerned more amicably. Article 23 was only to give some guidelines to States in their negotiations as to how harm should be determined and compensation be measured. For example, if the State of origin could demonstrate that certain preventive measures were taken solely with the intention of preventing transboundary harm, the cost of that aspect of preventive measures might be taken into account. Similarly, if the State of origin could show that the affected State had also benefited from the activity, it would only be fair that some reduction be made in the amount of compensation proportionate to the benefit. The Special Rapporteur explained that such criteria, due to their broad nature, could only be taken into account in diplomatic negotiations. Most likely, when the matter was before a domestic court, the relevant factors would be limited to what the domestic law provided (article 24 (c)).

514. A few comments were made about these two articles. The general problems as to whether such international organizations would have competence over these matters were also raised in the context of article 22. As for article 23, it was felt that it was perhaps too general.

Article 24. Harm to the environment and resulting harm to persons or property,

Article 25. Plurality of States of origin,

Article 26. Exceptions and

Article 27. Limitation 316/

515. The Special Rapporteur explained that transboundary harm may be to the environment of the affected State or to persons and property in that State.

316/ Articles 24, 25, 26 and 27 of the proposed outline read as follows:

"Article 24. Harm to the environment and resulting harm to persons or property

If the transboundary harm proves detrimental to the environment of the affected State:

Article 24 intended to provide some basis for remedies when harm was to the environment of the affected State. Accordingly, the State of origin was obligated to bear the costs of any reasonable operation to restore the conditions that existed prior to the occurrence of harm. If such restoration was impossible, parties should reach agreement on other remedies, including monetary compensation. Obviously, if damage was caused to persons and property in the affected State apart from its environment, they should also be

---

(a) The State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore these conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered;

(b) If, as a consequence of the harm to the environment referred to in the preceding subparagraph, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm;

(c) In the cases referred to in subparagraphs (a) and (b) above, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply.

"Article 25. Plurality of States of origin

In the cases referred to in the two preceding articles, if there is more than one State of origin,

Alternative A. [They shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.]

Alternative B. [They shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused.]

"Article 26. Exceptions

1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

(a) If the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or compensated. Factors relevant to determining the amount of compensation referred to in article 23 should be taken into account in negotiations between parties in respect of this article.

516. Many members welcomed the idea of imposing an obligation for compensation for harm to the environment. In their view, this was a step forward. But a few of these members saw no need for a separate article since the concept of harm as was defined in article 2 already included harm to the environment, particularly in view of the fact that the article applied to harm to the environment all the criteria relevant to determining and measuring damage to persons and property. There was therefore no point in stipulating the obligation to pay compensation for harm to the environment separately. One member disagreed with this view. He felt that traditionally compensation had been provided only for damage to persons and property. The notion that compensation should also be provided for damage to the environment *per se* was new and should therefore be stated separately. Another view was expressed that, in State practice, compensation for damage to the environment was paid only for those measures that were actually taken or were to be taken in order to restore the environment. Except for the Convention on the Regulation of

---

(b) If the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

2. If the State of origin or the operator, as the case may be, prove that the harm resulted wholly or partially either from an act or omission done with intent to cause harm by the person who suffered the harm or from the negligence of that person, in which case they may be exonerated wholly or partially from their liability to such person.

"*Article 27*. *Limitation*

Proceedings in respect of liability under these articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event, shall proceedings be instituted once 30 years have elapsed since the date of the accident that caused the harm. If the accident consisted of a series of occurrences, the 30 years shall start from the date of the last occurrence."

Antarctic Mineral Resources Activities which provided for compensation in case it was impossible to restore the *status quo ante*, no other State practice supported that view.

517. The Special Rapporteur stated that article 25 intended to deal with circumstances in which there was more than one State of origin whose activities had caused transboundary harm. He suggested two ways of approaching that problem. Under one approach, States of origin were jointly and severally liable and an entire claim might be brought against any one of them. That approach was more advantageous to the affected State and the injured party, was adopted by the Convention on International Liability for Damage Caused by State Objects and was more suitable for court proceedings. Under the second approach, the States of origin were liable only in proportion to the harm they had caused. It therefore allowed for each State of origin to put forward its procedural position and claims for reduction of compensation. This approach was more suitable for diplomatic negotiations. Most members who spoke on this article preferred the second approach proposed in alternative B. In their view, it was unlikely that States would accept full liability for harm which was also caused or aggravated as a result of activities of other States. One member felt that the concept of joint and several liability was established in domestic law and was more protective of the interest of the injured party without excluding the possibility for the States of origin to apportion the damages among themselves. The concept should therefore be maintained in this article.

518. Article 26 dealt with full or partial exoneration of liability. The Special Rapporteur explained that there might be circumstances in which transboundary harm occurred due to conditions beyond the control of the State of origin or the operator, or partly due to negligence of the affected State or of the party who suffered harm. Acts of war, hostilities, civil war, insurrection, natural phenomena of an exceptional character, or acts or omission of a third party done with the intent to cause harm, were grounds for exoneration. Such acts or omission or the negligence of the party who suffered harm were grounds for partial or complete exoneration. The Special Rapporteur explained that such grounds were common in conventions

READEX FICHE

dealing with liability. 317/ Article 27 set forth a statute of limitation. The date chosen for this article was, of course, subjective. The question was to determine a reasonable period of time. Some conventions had chosen one year following the date of the occurrence of the damage or from the date of the identification of the State of origin. 318/ The more recent instruments presently being drafted on issues of liability, for example, in the Council of Europe and the Economic Commission for Europe, seemed to opt for a 3 or 5-year time period from the discovery of the damage and a 30-year period after the occurrence of the accident, after which no claims may be brought against the person who caused the damage. 319/

519. On article 26 comments were made to the effect that it should also include terrorism as grounds for exoneration. Questions were also raised as to whether force majeure should also be included in that article. One member also stated that the wording of subparagraphs (a) and (b) of paragraph 1 of article 26 had to be harmonized because full exemption of the State concerned from liability was justified not only by the fact that the harm was directly due to the events referred to in subparagraph (a), but also and in particular by the fact that the harm was wholly caused by those events. As for article 27 the view was expressed that it was rather vague since it did not indicate what it meant by "proceedings". The way the article was drafted, it did not seem to apply to diplomatic negotiations and appeared to be limited to instances where the injured party was using judicial means.

317/ These conventions are cited in the sixth report of the Special Rapporteur, document A/CN.4/428, paras. 56-59.

318/ See, for example, article X of the Convention on International Liability for Damage Caused by Space Objects. United Nations, Treaty Series, vol. 961, p. 187.

319/ See rule 6 of the draft rules of the European Community on Legal Co-operation of the Council of Europe, document CDCJ (89) 60, 8 September 1989, and article 18 of the ECE draft Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, document TRANS/R.283.

(e) Chapter V. Civil Liability

520. The Special Rapporteur recalled that, up to now, liability had been envisaged in the articles as primarily falling on the State of origin for extraterritorial harmful consequences of activities conducted under its jurisdiction or control. 320/ Without prejudice to that notion, he felt that these draft articles should provide certain rules in order to ensure a minimum degree of uniformity in the treatment of claims arising from activities under article 1 by national courts. As it was, there was nothing to prevent a claimant who suffered transboundary harm from pursuing a claim before the courts of the State of origin. Besides, there might be situations where the affected State might wish not to bring any claims on behalf of its citizens against the State of origin. In such cases private law remedies would be the only channel for individuals to seek redress. He therefore thought that it would be useful to have some articles dealing with civil liability. Articles 28 to 33 were designed for that purpose. 321/

521. Article 28, the Special Rapporteur explained, intended to bring into harmony the two channels for pursuing a remedy, namely diplomatic negotiations

---

320/ For the discussion at this session on the issue of whether the operator or the State of origin should bear primary liability see paras. 508 to 510.

321/ Articles 28, 29, 30, 31, 32 and 33 in the proposed outline read as follows:

"CHAPTER V. CIVIL LIABILITY

"Article 28. Domestic channel

(a) It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

(b) There is nothing in these articles to prevent a State, or any individual or legal entity represented by that State and that considers it has been injured as a consequence of an activity referred to in and proceedings before domestic courts. Accordingly, presentation of a claim through negotiations between States did not require prior exhaustion of local remedies in the State of origin. At the same time, if a claim had already

---

article 1, from submitting a claim to the courts of the State of origin [and in the case of article 29, subparagraph (c), of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.

"Article 29. Jurisdiction of national courts

(a) The parties shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in the preceding article, and shall also give affected States or individuals or legal entities access to their courts.

(b) States parties to these articles shall make provision, in their domestic legal systems, for remedies that permit prompt and adequate compensation or other reparation of transboundary harm caused by activities referred to in article 1 carried out under their jurisdiction or control.

(c) Except for the affected State, the other persons referred to in the preceding article who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.

"Article 30. Application of national law

The court shall apply its national law in all matters of substance or procedure not specifically regulated by these articles. These articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.

"Article 31. Immunity from jurisdiction

States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, save in respect of enforcement measures.

"Article 32. Enforceability of the judgement

1. When a final judgement made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

been presented before the domestic courts, the affected State was barred from presenting a claim for the same harm for which such claim had been made. Claims might be instituted against the State of origin or a liable private party in the courts of the affected State.

522. The Special Rapporteur mentioned two issues that must be resolved in respect of private law remedies: first, access to courts for all affected parties including the affected State and secondly the availability of remedies in applicable domestic laws. To resolve the former, States should, through their national legislation, give their courts subject-matter jurisdiction over claims in respect of transboundary harm covered by these articles. To resolve the latter, States should make sure that reasonable pecuniary and other forms of remedy were available under their domestic law. Article 29 dealt with such jurisdictional issues.

523. In order to ensure some minimum uniformity in the laws applied by domestic courts, in the view of the Special Rapporteur, those courts should

---

(a) The judgement has been obtained fraudulently;

(b) The respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;

(c) The judgement is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

2. A judgement which is recognized to be in accordance with the preceding paragraph shall be enforceable in any of the States parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.

"Article 33. Remittances

States parties shall take the steps necessary to ensure that any monies due to the Applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover such harm, may be freely remitted to the Applicant in the currency of the affected State or in that of the State of his habitual residence."

apply these articles and, of course, the domestic laws in respect of all matters whether procedural or of substance not dealt with in these articles. Domestic laws must be applied in such a manner as to be compatible with article 10, namely not to make any discrimination. The Special Rapporteur stated that he had borrowed this idea from articles 13 and 14 of the Paris Convention on Third Party Liability in the Field of Nuclear Energy. 322/ Domestic law remedies could only be used if the States of origin could not invoke immunity from jurisdiction (subject of article 31). 323/ Article 32 dealt with enforcement of judgements and article 33 removed any obstacles from the transfer of monetary compensation.

524. A number of members welcomed chapter V giving the option to the injured party to avail itself of domestic courts. Some of these members, however, felt that the articles should be re-examined again since it seemed to have been modelled primarily after the articles on the Convention on International Liability for Damage Caused by Space Objects which might not be entirely appropriate for this topic. Besides, article 31 on immunity from jurisdiction should be brought into harmony with the articles of the topic Jurisdictional immunities of States and their property. It was also pointed out that resort to domestic courts should not deny other forms of recourse available to private claimants in case of, for example, denial of justice.

525. For those members who preferred that the topic be based primarily on civil liability, namely the liability of the operator, the articles of chapter V were not appropriate and needed reformulation to express that idea.

3. Liability for harm to the environment in areas beyond national jurisdiction (global commons)

526. At the request of the Commission made last year, the Special Rapporteur had examined the possibility of extending the topic to include harm to areas

---

322/ United Nations, Treaty Series, vol. 956, p. 251.

323/ This article did not deal with immunity from enforcement measures. A similar idea was provided in article 13 (e) of the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 and article XIV of the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963. United Nations, Treaty Series, vol. 956, p. 251 and ibid., vol. 1063, p. 265, respectively.

beyond national jurisdiction of States or the so-called "global commons". The Special Rapporteur examined a number of issues. They related to policy and the applicability of important components of the theory of liability constituting the present approach to the topic so far to harm to "global commons". It was evident, he felt, that industrial civilization had reached a point in which harm was being caused either in small quantities, but repeatedly, or in large amounts by accidents, but occasionally, to the environment in areas beyond national jurisdiction of States. The question was what were the best ways of confronting the problem. The choice had to be made between the two topics currently before the Commission, either within the framework of liability in this topic or within the framework of responsibility for wrongful acts in the topic of State responsibility.

527. As regards the applicability of some important components of theory of liability forming the basis of the present topic, the Special Rapporteur referred to two elements: (a) the concept of harm and (b) the concept of affected States. He noted that two possibilities existed when harm occurred in the areas beyond national jurisdiction, either that harm affected persons and property or that it affected the environment _per se_. The former possibility was already anticipated and hence came within the framework of the international liability topic. The latter possibility, namely harm to the environment _per se_ in areas beyond national jurisdiction, however, posed considerable difficulty because that type of harm was not covered in the concept of harm appropriate for the international liability topic. He noted that harm to the environment _per se_ as an independent ground for liability was new and that if such harm was to be measured on the basis of its impact on persons or property it was difficult, in the current stage of scientific development, to measure with a sufficient degree of precision what identifiable harm to the "global commons" would result in identifiable harm to human beings or property. Even though, he explained, an overall correlation can be made between harm to the "global commons", the environment in general and the well-being and quality of life of human beings, it did not seem to be enough to establish the causal link necessary under the liability topic as presently formulated. That would require, perhaps, a different definition of harm and a different threshold of harm. There seemed to be only one

convention so far which had gone close to imposing liability for harm to the environment per se and that was the Convention on the Regulation of Antarctic Mineral Resources Activities. He admitted that the absence of State practice was indicative of the fact that the problem was recent.

528. The Special Rapporteur noted that if harm to the "global commons" was to be measured on the same basis as currently understood in the liability topic, the consequences could be undesirable. The topic measured harm in relation to its significant harm to human beings or property. Significant harm to the environment of the global commons might not lead to immediate significant harm to human beings: in order to affect human beings, harm to the global commons might have to reach a point of no return, given the enormous magnitude of the spaces involved. It seemed to the Special Rapporteur that currently in general international law there was no liability for that harm to the environment of the global commons which did not affect persons or property. He believed, however, that such a situation should not be allowed to continue, and that international law should provide some form of remedy. In recent international practice, harm to the "global commons" had been approached by identifying certain substances harmful to the "global commons" and establishing a limit about their discharge into them. Any discharge over and above the permissible level might entail liability. He referred to a further difficulty in applying the concept of liability, as now formulated, to harm to the "global commons", namely the identification of the affected State. Since harm to those areas did not necessarily have consequences on States, their nationals or their property, the determination of the injured State posed a special problem. The Special Rapporteur thought that the notion of "collective interest" could be used to answer that question, in the terms of article 5 (2) (f) of Part Two of the draft articles on State responsibility.

529. The Special Rapporteur noted that a review of State practice seemed to indicate that harm to the "global commons" had been confronted with identifying certain harmful substances or areas of the "global commons" and making them subject to certain regulations, such as restricting or banning the use of certain substances or banning any activity which would cause harm to certain parts of the "global commons". The most recent examples were the

Vienna Convention for the Protection of the Ozone Layer (and its Montreal Protocol) and the United Nations Convention on the Law of the Sea. The trend, in the Special Rapporteur's view, indicated that the problem was being confronted in the context of State responsibility for wrongful acts. He felt that that approach had some advantages. It used the concept of legal injury, 324/ namely injury for mere violation of an obligation which resolved the problem of having to demonstrate harm to persons or property. He explained, however, that these were his preliminary views and he wished to hear comments in the Commission.

530. Because of lack of time only a few members made comments, of a preliminary nature, about the "global commons". Most of them believed that the question of harm to the "global commons" could not be ignored and some regulation should be envisaged. They therefore encouraged the Special Rapporteur to continue his work on this issue. One member referred in this connection to the United Nations Convention on the Law of the Sea and Stockholm Principle 21. He advocated considering an approach involving international class actions, coupled with insurance schemes and voluntary funds. Another member felt that the issues raised in the context of the "global commons" were complex and might disturb progress on the topic which was already complicated. Yet for another member the subject could form a separate topic.

C. Points on which comments are invited

531. The Commission would welcome the views of Governments either in the Sixth Committee of the General Assembly or in written form, in particular on:

(a) clarification of the concept of significant risk by the introduction of a list of dangerous substances (paras. 478 to 483); and

(b) whether and to what extent the draft articles should provide for liability of the State of origin for transboundary harm caused by the activities under its jurisdiction or control covered by this topic when they are conducted by private parties (paras. 508 to 510).

324/ The concept of "legal injury" is introduced in article 3 of Part One of the topic on State responsibility.

CHAPTER VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

532. At its 2149th meeting on 1 May 1990 the Commission noted that in paragraph 4 of its resolution 44/35, the General Assembly had requested the International Law Commission

> "(a) To keep under review the planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;
>
> (b) To consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute, *inter alia*, to a more effective consideration of its report in the Sixth Committee;
>
> (c) To pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work;".

533. The Commission decided that these requests should be taken up under item 9 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation".

534. The Planning Group of the Enlarged Bureau was composed as indicated in paragraph 5 above. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

535. The Planning Group held four meetings between 8 May and 10 July 1990. It had before it the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fourth session entitled "Programme, procedures and working methods of the Commission" (A/CN.4/L.443, paras. 324-343). It also had before it a number of proposals submitted by members of the Commission.

536. The Enlarged Bureau considered the report of the Planning Group at its 4th meeting on 12 July 1990. At its 2200th meeting, on 18 July 1990, the Commission adopted the following paragraphs on the basis of recommendations of the Enlarged Bureau resulting from the discussions in the Planning Group.

Planning of activities

Present programme of work

537. The Commission is of the view that the programme of work which it set itself for the remainder of the five-year term of office of its members remains valid subject however to some adjustments.

538. Under this programme of work, the Commission intended to complete, during the current term of office of its members, the second reading of the draft articles on jurisdictional immunities of States and their property. At its last session, the Commission expressed the intention to make every effort to complete the second reading at the current session. The Drafting Committee at the current session reviewed and provisionally adopted on second reading 16 of the draft articles provisionally adopted on first reading. The Commission expects to submit to the General Assembly at its forty-sixth session the entire set of draft articles, thereby attaining its goal of concluding the second reading of the draft before the end of the current term of office of its members.

539. The Commission also expressed the intention to give priority to the topic "Draft Code of Crimes against the Peace and Security of Mankind" and to the topic "The law of the non-navigational uses of international watercourses" with a view to completing the first reading of the draft articles on both topics at its forty-third session.

540. As regards the topic "Draft Code of Crimes against the Peace and Security of Mankind", the consideration in plenary of all the provisions which will comprise Chapters I and II has now been concluded. It should be noted however that a number of the provisions submitted by the Special Rapporteur are still pending before the Drafting Committee. The Commission intends to make every effort at its next session with a view to completing the first reading of the draft articles at the earliest possible date. Also in relation to this topic, the Commission may, depending on the reaction of the General Assembly to the work carried out at the current session under resolution 44/39, devote further attention to the request contained in that resolution.

541. As regards the topic "The law of the non-navigational uses of international watercourses", substantial progress was achieved at the current

session and it may be expected that the Commission will be able to complete the first reading of the relevant draft articles at its forty-third session.

542. In keeping with the intentions it expressed at the outset of the current five-year term of office, the Commission will endeavour to make substantial progress on the topics "State responsibility" and "International liability for injurious consequences arising out of acts not prohibited by international law", and continue consideration of the second part of the topic "Relations between States and international organizations".

Long-term programme of work

543. Pursuant to paragraph 736 of the report of the Commission on the work of its forty-first session, the Working Group established at that session to consider the Commission's long-term programme of work continued the examination of questions within its mandate. The Working Group, which was composed of Mr. Díaz-González (Chairman), Mr. Al-Khasawneh, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat, submitted a progress report to the Planning Group. 325/

325/ The substantive part of the report read as follows:

"1. The discussions of the Working Group revolved mainly around the following points:

(a) General criteria for the selection of new topics;

(b) Possible new specific topics for the Commission's agenda;

(c) Form and timing of the Commission's recommendations to the Assembly on future programme of work.

"2. As regards the general criteria suited to guide the selection of new topics, there was broad agreement that, primarily, account should be taken of the pressing needs of the international community at its present stage of development in the last decade of the twentieth century. It was indicated that the Commission, in accordance with its role as the main organ established by the General Assembly for the codification and progressive development of international law, should actively contribute to framing the requisite legal rules to accommodate those needs. Topics designed to provide practical answers to current issues of legal policy in various areas of international life should have priority over topics concerning which doctrinal and theoretical interests prevailed. It was

544. The Planning Group and at a later stage the Commission took note of the report and endorsed the Working Group's suggestion that it hold further meetings at the Commission's next session with a view to formulating appropriate recommendations on the questions within its mandate.

---

also suggested that new topics should be fairly manageable with regard to their time requirements. Given the fact that the Commission was presently seized with a number of themes whose study had begun many years ago and were not likely to be completed during the present term of office of its members by 1991, it would be unwise, at the present juncture, additionally to burden the agenda with topics of a similarly complex nature. Any new topic should be susceptible of being dealt with in a few years' time.

"3. Members of the Group focused on some specific topics for possible inclusion in the Commission's programme of work. A strong case was made for a topic concerning 'protection of the environment' or 'legal principles regulating the protection of the environment'. The usefulness and world-wide interest of this topic were stressed as well as the need for codifying, from a global perspective, the principles regulating the environment. On the other hand the possible relationship or partial overlapping of the proposed topic with some of the topics presently on the Commission's agenda was also pointed out.

"4. Another topical area strongly supported was 'the international law of economic relations'. Aspects of this area specifically mentioned included 'the regulation of foreign indebtness', 'the international legal régime of investments', 'legal aspects of contracts between States and foreign corporations' and 'legal aspects of economic development'.

"5. Other themes mentioned were 'the refugee problem', 'legal aspects of the international trade in arms', 'a new generation of human rights', 'updating of rules related to armed conflicts and protection of the civilian population', 'legal aspects of disarmament' and 'extra-territorial jurisdiction'.

"6. While not a specific topic, the suggestion was also made that the Commission could indicate to the General Assembly its readiness to receive from the Assembly requests for legal opinions on some pressing legal issues of the international community. In order to respond to such requests the Commission could use methods of work different from those employed in the consideration of the regular topics in its agenda. An example given in this connection was the handling by the Commission of the question concerning the establishment of an international criminal jurisdiction and the options paper prepared as a reply to the Assembly's request (See Chapter II, Section C above).

545. The Commission agreed to allocate some time next year to the consideration of its long-term programme of work, taking into account in particular the conclusions which it expects to receive from the Working Group, and to formulate recommendations on the question.

Methods of work

546. The Commission continued to discuss various proposals for the most efficient organization of its work. These included proposals by some members to hold special sessions of the Commission outside its regular annual sessions (for instance for specific tasks such as meetings of the Drafting Committee)

> "7. With reference to the form and timing of the Commission's recommendations to the General Assembly, it was generally agreed that only a few topics should be selected and that the reasons for the choice should be clearly and cogently stated. A long-term programme should be established as soon as possible although many valid reasons militated in favour of commencing the study of any new themes only after finalizing the work on some of the topics presently on the Commission's agenda.
>
> "8. Furthermore, it was agreed that any recommendation to the General Assembly on the Commission's long-term programme of work should also take into account the objectives of the Decade of International Law recently declared by the General Assembly under resolution 44/23 of 17 November 1989, among which figured prominently the encouragement of the progressive development of international law and its codification. The Commission, as the main organ created by the Assembly for the codification and progressive development of international law, should play an active role in the fulfilment of the Decade's objectives. However, before formulating recommendations to the General Assembly, it was considered indispensable to examine the views of Member States, appropriate international bodies and non-governmental organizations requested under paragraph 3 of the above-mentioned resolution and, in particular, the conclusions of the working group of the Sixth Committee which the Assembly had decided to establish at its forty-fifth session under paragraph 4 of said resolution, with a view to preparing generally acceptable recommendations for the Decade.
>
> "9. Therefore, the Working Group suggests that it hold further meetings at the Commission's next session with a view to formulating appropriate recommendations on the questions within its mandate, in the light of the considerations set out in paragraphs 3 to 8 above, and, in particular, bearing in mind the programme to be adopted by the General Assembly for the Decade of International Law."

and to split the annual session into two parts (to be convened alternately in New York and Geneva for example). Other members pointed to difficulties with respect to the various proposals made. Further consideration of these questions for the next term of office of members would have to take into account the most efficient and flexible way to deal with the items on the agenda of the Commission, as well as financial considerations.

Role of the Drafting Committee

547. The Commission is aware of the need to facilitate the work of the Drafting Committee. 326/ One way of meeting this concern would be to arrange for meetings of the Drafting Committee between the regular sessions of the Commission. The Commission commends this possibility to the attention of the General Assembly.

548. At this stage, the Commission agreed that in order to meet the goals it set for itself as described in paragraphs 538 to 542 above, it should, as an exceptional arrangement, allow for two weeks of concentrated work in the Drafting Committee at the beginning of the next session, the last of the current term of office of its members.

Decade of International Law

549. The Commission welcomes resolution 44/23 of the General Assembly which declared the period 1990 to 1999 as the United Nations Decade of International Law. As stated in that resolution, one of the main purposes of the Decade is to encourage the progressive development and codification of international law. Under article 1 of its statute, the Commission was established for "the

---

326/ At the concluding stage of the current session, the Drafting Committee had pending before it: draft articles 6, 7, 8, 9 and 10 on State responsibility; draft articles 17 to 28 on jurisdictional immunities of States and their property; draft articles 9, 13, 14, 15, 16 and 17 on the Draft Code of crimes against the peace and security of mankind; draft articles 1, 24, 25, 26, 27 and 28 on the Law of the non-navigational uses of international watercourses, as well as article 3, paragraph 1 and article 4 of a draft Annex; draft articles 1 to 9 on International liability for injurious consequences arising out of acts not prohibited by international law; and draft articles 1 to 11 on Relations between States and international organizations (second part of the topic).

promotion of the progressive development of international law and its codification". The Commission considers that it would be an essential contribution to the Decade if it could finalize work on the topics presently on its agenda. The Commission further considers that a particularly appropriate contribution to the basic purposes of the Decade and the strengthening of the rule of law in international relations would be the preparation by the Commission of a draft statute for an international criminal court, if the General Assembly so decides.

Relationship of the Commission with the General Assembly

550. The Commission notes with satisfaction the continuation within the Sixth Committee of the General Assembly of efforts to improve the ways in which the report of the Commission is considered in the Committee, with a view to providing effective guidance for the Commission in its work. The Commission is aware of the need to facilitate the consideration of its report by the Sixth Committee. It has in particular endeavoured to meet the expectations of the General Assembly as reflected in paragraph 4 (c) of resolution 44/35, whereby the Assembly requested it "to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work". 327/

551. The Commission also takes note with satisfaction of paragraph 5 of resolution 44/35 whereby the General Assembly

> "*Invites* the International Law Commission, when circumstances so warrant, to request a special rapporteur to attend the session of the General Assembly during the discussion of the topic for which that special rapporteur is responsible and requests the Secretary-General to make the necessary arrangements within existing resources.".

The Commission wishes to refer in this connection to paragraph 742 of its report on the work of its forty-first session which draws attention to the

---

327/ Points on which comments are invited with respect to the topics "The law of non-navigational uses of international watercourses" and "International liability for injurious consequences arising out of acts not prohibited by international law" are to be found in paragraphs 313 and 531 respectively.

possibility of enabling special rapporteurs to attend the debates of the Sixth Committee on the report of the Commission so as to give them the opportunity to get a more comprehensive view of existing positions, to take note of observations made and to engage in the preparation of their reports at an earlier stage. The paragraph also reflects the view that in addition to the reasons already cited, the presence of special rapporteurs could facilitate useful informal contacts, exchanges of views and consultations between special rapporteurs and representatives of Governments. 328/

Duration of the next session

552. The Commission wishes to reiterate its view that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of the session be maintained. The Commission also wishes to emphasize that it made full use of the time and services made available to it during its current session.

B. Co-operation with other bodies

553. The Commission was represented at the March 1990 session of the Asian-African Legal Consultative Committee, in Beijing, by Mr. Bernhard Graefrath as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Frank Njenga. Mr. Njenga addressed the Commission at its 2160th meeting on 18 May 1990 and his statement is recorded in the summary record of that meeting.

554. The Commission was represented at the 1989 session of the Inter-American Juridical Committee, in Rio de Janeiro, by Mr. Bernhard Graefrath as Chairman

---

328/ At its 2200th meeting on 18 July 1990, the Commission requested Mr. Doudou Thiam, Special Rapporteur for the Draft Code of Crimes against the Peace and Security of Mankind, to attend the forty-fifth session of the General Assembly during the discussion of his topic.

of the Commission, who attended the session as observer on behalf of the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Guerreiro. Mr. Guerreiro addressed the Commission at its 2166th meeting on 31 May 1990 and his statement is recorded in the summary record of that meeting.

555. The Commission was represented at the November 1989 session of the European Committee on Legal Co-operation, in Strasbourg, by Mr. Tomuschat who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Co-operation was represented at the present session of the Commission by Ms. Margaret Killerby. Ms. Killerby addressed the Commission at its 2191st meeting on 11 July 1990 and her statement is recorded in the summary record of that meeting.

C. Date and place of the forty-third session

556. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 29 April and conclude on 19 July 1991.

D. Representation at the forty-fifth session of the General Assembly

557. The Commission decided that it should be represented at the forty-fifth session of the General Assembly by its Chairman, Mr. Jiuyong Shi.

E. International Law Seminar

558. Pursuant to General Assembly resolution 44/35, the United Nations Office at Geneva organized the twenty-sixth session of the International Law Seminar during the current session of the Commission. The Seminar is intended for post-graduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

559. A Selection Committee under the chairmanship of Professor Philippe Cahier (The Graduate Institute, Geneva) met on 27 March 1990 and, after having considered some 80 applications for participation in the Seminar, selected 24 candidates of different nationalities mostly from developing countries.

Seventeen of the selected candidates, as well as three UNITAR fellowship holders, were able to participate in this session of the Seminar. 329/

560. The session of the Seminar was held at the Palais des Nations from 5 to 22 June 1990 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission and lectures specifically organized for them. Several lectures were given by members of the Commission as follows: Mr. Husain Al-Baharna: "The International Law Commission in perspective: historical and legal development of its programme of work"; Mr. Mohamed Bennouna: "The United Nations Convention on the Rights of the Child"; Mr. Ahmed Mahiou: "The work of the International Law Commission"; Mr. Stephen McCaffrey: "The law of the non-navigational uses of international watercourses"; Mr. César Sepulveda-Gutierrez: "The relationship between public international law and politics"; Mr. Doudou Thiam: "Draft Code of Crimes against the Peace and Security of Mankind"; Mr. Christian Tomuschat: "Jurisdictional immunities of States and their property".

561. In addition, talks were given by staff of the United Nations, as well as the International Committee of the Red Cross and the General Agreement on Tariffs and Trade, as follows: Mr. Antoine Bouvier (Legal Division of the ICRC): "Approach of the international humanitarian law"; Mr. Vladimir Kotliar (Office of Legal Affairs): "The activities of the Codification Division";

329/ The list of participants in the twenty-sixth session of the International Law Seminar is as follows: Mr. Louis-Antoine Aledo (France); Mr. Moenir Ari Soenanda (Indonesia); Mr. Dominique Bassinga (Burkina Faso); Mr. Albert Beja (Observer) (Albania); Ms. Teresa Blake (Ireland); Mr. Joaquin Caceres Brun (Paraguay); Mr. Marcelo Canton (Uruguay); Ms. Esther Chibanda (Zimbabwe); Mr. Mohiuddin Farooque (Bangladesh); Mr. Francisco Flores Villa (Panama); Mr. Andreas de Hoogh (Netherlands); Ms. Ahilenah Jonet (Malaysia); Mr. Niklas Kebbon (Sweden); Ms. Sara Lozano Veliz (Ecuador); Mr. Saïd Moustakime (Comoros) (UNITAR fellowship holder); Mr. Virachai Plasai (Thailand); Mr. Haji Razmi (Afghanistan) (UNITAR fellowship holder); Mr. Abdallah Saffari (Tanzania); Mr. José Sandoval (Ecuador) (UNITAR fellowship holder); Mr. Joaquin Tacsan (Costa Rica); Mr. Smokin Wanjala (Kenya).

Mr. Jakob Möller (Centre for Human Rights): "Handling of human rights complaints"; Mr. Dennis McNamara (Office of the United Nations High Commissioner for Refugees): "International instruments for the protection of refugees"; Mr. Frieder Roessler (GATT, Legal Affairs Division): "The activities of the Legal Affairs Division of the GATT".

562. As it has become a tradition for the Seminar, the participants enjoyed the hospitality of the Town of Geneva and were also officially received by the Republic and Canton of Geneva. On that occasion they were addressed by Mr. Bollinger, Chief of Information of the Canton, who gave a talk on the constitutional and political features of Switzerland in general and the Canton of Geneva in particular.

563. At the end of the session of the Seminar, Mr. Jiuyong Shi, Chairman of the International Law Commission, and Mr. Jan Martenson, Director-General of the United Nations Office at Geneva, addressed the participants. In the course of this brief ceremony, each of the participants was presented with a certificate attesting to his or her participation in the twenty-sixth session of the Seminar.

564. The Seminar is funded by voluntary contributions from Member States and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Austria, Bahrain, Cyprus, Denmark, the Federal Republic of Germany, Finland, Ireland, New Zealand, the Philippines, Sweden and Switzerland had made fellowships available in particular to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 13 participants and partial fellowship (subsistence only) could be given to one participant. Thus of the 576 participants, representing 142 nationalities, who have taken part in the Seminar since its inception in 1964, fellowships have been awarded to 294.

565. The Commission stressed the importance it attaches to the sessions of the Seminar, which enables young lawyers and especially those from developing

countries to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission noted with regret that in 1990 not all applicants who had applied for financial assistance could be awarded fellowships and that some of them were therefore unable to participate in the Seminar although they had been selected on the basis of their good qualifications. The Commission therefore recommended that the General Assembly should again appeal to States which can do so to make the voluntary contributions that are needed for the holding of the Seminar in 1991 with as broad a participation as possible.

566. The Commission noted with satisfaction that in 1990 full interpretation services had been made available to the Seminar and it expressed the hope that every effort would be made to continue to provide the Seminar at future sessions with the same level of services and facilities despite existing financial constraints.

567. At its 2190th meeting, on 10 July 1990, the Commission decided that the twenty-seventh session of the International Law Seminar would be dedicated to the memory of Mr. Paul Reuter and entitled The Paul Reuter session.

كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم . استعلم عنها من المكتبة التي تتعامل معها أو اكتب إلى : الأمم المتحدة ، قسم البيع في نيويورك أو في جنيف .

如何购取联合国出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

Litho in United Nations, New York
03200
ISSN 0082—822X
19686—September 1990—3,700